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GRAY VS. POWELL AND THE SCOPE OF REVIEW

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In dissenting from the decision of the Supreme Court in a celebrated administrative-law case, Justice Jackson once declared: "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.' "[1] It cannot be denied that the learned justice's reaction is one which is often felt by students of Supreme Court jurisprudence. This has been particularly true of the field involved in the case which called forth Justice Jackson's plaint — i.e., that of administrative law. American administrative lawyers have not infrequently had this same response to decisions of the highest tribunal.

Among Supreme Court administrative-law decisions, few have been better calculated to produce such response among the legal profession than those involving the doctrine usually associated with the case of *Gray v. Powell.*[2] That doctrine, as we shall see, is one which is of basic importance in the law of judicial review of agency action, for it drastically narrows the role of the reviewing court with regard to questions that appear to be more legal than factual in nature.[3] What makes the doctrine especially difficult for students of administrative law, however, is the fact that the Supreme Court has been (to put it mildly) inconsistent in its application. There have been many cases since the doctrine of *Gray v. Powell* was first enunciated, which would seem to be governed by it, where the Court has simply not applied the doctrine. And, to make matters worse, the Court, in many of them, has not seen fit to tell us why it was acting as it did or even, for that matter, to mention the doctrine of *Gray v. Powell* at all. This has led, not unnaturally, to the belief that the Court in this field

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1 Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 at 214, 67 S.Ct. 1575 (1947).

2 314 U.S. 402, 62 S.Ct. 326 (1941).

3 The expression used by Murphy, J., in Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469 at 478, 67 S.Ct. 801 (1947).

has been guided by purely discretionary factors — or, more bluntly, by the arbitrary whims and caprices of the majority of the justices. As one commentator expresses it, "The one statement that can be made with confidence about applicability of the doctrine of Gray v. Powell is that sometimes the Supreme Court applies it and sometimes it does not. The criteria that guide the use or non-use of the doctrine are exceedingly elusive. Many cases defy explanation except in terms of judicial discretion."[4]

To the student of administrative law, the unexplained vagaries of the Supreme Court in its application of the doctrine of *Gray v. Powell* are most disturbing. The life of the law may not be logic, but a legal system that is not logically consistent internally leaves much to be desired. Whatever one may think of the merits of the doctrine of *Gray v. Powell,* its application should be a consistent one. If, on the contrary, that doctrine is sometimes applied and sometimes not,[5] in cases that appear to be fundamentally alike, then the law on the subject is far from satisfactory. The evil resulting from the high Court's inconsistency in applying a supposedly established doctrine is self-evident. If the application of such doctrine in particular cases depends solely upon judicial fancy, the law becomes, as Justice Roberts once expressed it, not a chart to govern conduct, but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and parties will bring actions in the teeth of the accepted doctrine on the not improbable chance that the doctrine will be thrown overboard. Defendant agencies will not know whether to litigate or to settle review actions, for they will have no assurance that the declared rule will be followed. "But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy."[6]

It is these implications of the Supreme Court jurisprudence that have led the present writer to undertake, in this paper, a reexamination of the doctrine of *Gray v. Powell.* The primary concern in doing this is to determine whether or not the inconsistencies of the Court already referred to in applying that doctrine can be explained (at least in most cases) upon a rational basis.

4 DAVIS, ADMINISTRATIVE LAW 893 (1951).
5 Id. at 887.
6 Mahnich v. Southern S.S. Co., 321 U.S. 96 at 112, 64 S.Ct. 455 (1944).

But before such determination can be attempted, it is necessary first to ascertain just what doctrine it was that the highest Court enunciated in *Gray v. Powell* and what the effect of that doctrine has been upon the scope of judicial review of administrative action.

Doctrine of Gray v. Powell

Gray v. Powell[7] arose out of a petition to review an order of the Director of the Bituminous Coal Division of the Department of the Interior. Petitioners were the receivers of the Seaboard Air Line Railway Company and as such were the holders of coal leases on certain coal lands in Virginia and West Virginia from which they were having coal mined by independent contractors. The coal thus mined was used by petitioners in the operation of the interstate railway system of which they were receivers. The receivers, as producers of coal, filed an application under the relevant section of the Bituminous Coal Act[8] asking that they be held exempt from the price-fixing provisions of the act by reason of the exemption contained therein, to the effect that such provisions "shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him." The receivers asserted that they were producer-consumers within this provision and hence entitled to exemption from the act. The director held that they were not "producers" consuming their own product and issued an order denying the claimed exemption. It was this order that the receivers sought to have reviewed.

The Court of Appeals for the Fourth Circuit reversed the agency order, declaring that "the decision of the Director is not supported by substantial evidence and is based upon error of law."[9] According to Circuit Judge Parker, the petitioners clearly were "producers" of coal within the meaning of the exemption provision of the Coal Act. "For the purpose of the Act, we cannot see what difference it makes whether the owner of a mine digs the coal himself with his own organization or whether he has it dug for him by an independent contractor, who assumes the risks and responsibilities of that relationship. In either event, the owner causes the coal to be mined and prepared for use. . . . If he sells

7 314 U.S. 402, 62 S.Ct. 326 (1941).
8 50 Stat. L. 72, c. 127 (1937).
9 Powell v. Gray, (4th Cir. 1940) 114 F. (2d) 752 at 757.

it, he should certainly be held subject to the regulatory provisions of the Act; and if he consumes instead of selling it, there is as much reason for exempting him from the regulatory provisions in the one case as in the other."[10] Since the agency construction of the relevant statutory provision was, in the opinion of the court, erroneous, its order could not stand.

That the Supreme Court reversed the decision of the court of appeals is less important than the reasons given for the Court's action. Review of the agency conclusion that petitioners were not producers is not to be based, as was the decision below, upon independent judicial determination of whether they came within the statutory term. Instead, said Justice Reed, "In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here . . . , the function of review placed upon the courts . . . is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner."[11]

An agency determination like that at issue "belongs to the usual administrative routine."[12] Congress could itself have legislated specifically as to individual exemptions, but instead delegated that job to the administering agency. "Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. Certainly, a finding on Congressional reference that an admittedly constitutional act is applicable to a particular situation does not require such further scrutiny. Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director."[13]

The sweep of the statutory term "producer," said Justice Reed, must be left to the administrative agency. As in most cases, the application of that term in a particular case is a matter of degree. "The separation of production and consumption is complete when a buyer obtains supplies from a seller totally free from buyer connection. Their identity is undoubted when the consumer extracts coal from its own land with its own employees. Between

[10] Id. at 756.
[11] 314 U.S. 402 at 411, 62 S.Ct. 326 (1941).
[12] Ibid.
[13] Id. at 412.

the two extremes are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission[14] to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed."[15]

Such, briefly stated, was the decision of the Supreme Court in *Gray v. Powell.* Its importance lies in the Court's statement with regard to the scope of review of the administrative finding that the petitioners were not "producers" within the exemption provision of the relevant statute. The court of appeals had decided that the agency had erred in its finding; in its opinion, those in petitioners' position clearly were "producers" of coal consuming their own product, even though the actual mining was carried on by independent contractors. A similar position was taken in the Supreme Court by three dissenting justices. According to Justice Roberts, who delivered the dissenting opinion, "This court obviously fails in performing its duty and abdicates its function as a court of review if it accepts, as the opinion seems to do, the Director's definition of 'producer' and then proceeds to accommodate the meaning of related provisions to the predetermined definition. So to do is a complete reversal of the normal and usual method of construing a statute."[16] Where the agency construction of the term "producer" is erroneous, it is the duty of the reviewing court to reverse its order. And, said Justice Roberts, that was the case here. The agency finding was based upon the fact that the coal in question was mined for it by people not its employees. But, in the view of the dissenters, this made no difference. "The only possible differentiation between the respondents' method of conducting the business and that of the usual captive mine lies in the fact that the respondents' coal is mined by an independent

[14] It should be noted that the agency in Gray v. Powell before whom the hearing was originally held was the National Bituminous Coal Commission. While the case was pending, it was abolished by presidential reorganization plan and its functions transferred to the Bituminous Coal Division, headed by a director, set up in the Department of the Interior. This explains why Justice Reed, in the quoted portions of his opinion, refers both to the "director" and the "commission."

[15] 314 U.S. 402 at 413 (1941).

[16] Id. at 420-421. Stone, C.J., and Byrnes, J., joined in the dissent.

contractor instead of by employes. That circumstance, however, will not justify the statement that respondents do not produce the coal, any more than it would justify the statement that they would not transport coal to themselves, within the meaning of the Act, if they shipped it by a common carrier who was an independent contractor. The circumstance that the coal is mined by a contractor instead of an employe, or transported by a common carrier, cannot have any more, or any different, effect upon the subjects of regulation — prices and unfair methods of competition — in the one case than in the other."[17]

Both the decision of the court of appeals and the dissent in the Supreme Court indicate that the Director of the Bituminous Coal Division may well have been wrong in giving to the term "producer" the meaning which he had. In the opinion of the majority of the Supreme Court, however, it does not follow from this that his decision must necessarily be reversed. For *Gray v. Powell* stands for the proposition that the test upon review is not the *rightness* of the challenged administrative finding, but only its *reasonableness.*

In *Gray v. Powell* itself, it is at least arguable that the agency determination was not right. The Court expressly stated that that was not its concern upon review. The reviewing court can reverse only when it "can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment."[18] In such a case, it would seem that the administrative finding is not only *not right,* but also *not reasonable.* Where, on the contrary, the agency determination, though perhaps erroneous in the view of the reviewing court, is a reasonable one, "it is the Court's duty to leave the Commission's judgment undisturbed."[19] It may be going too far to assert, as did Justice Roberts in his dissent, that the majority of the Court adopted its construction of the term "producer" "apparently only because the Director has adopted it,"[20] but it is certainly true that, under the Court's reasoning, it could not substitute its judgment for that of the director on the proper construction of the statutory term. Even if the Court

[17] Id. at 421.
[18] Id. at 413.
[19] Ibid.
[20] Id. at 422.

would have construed the term differently had the matter been before it originally for decision upon its own independent judgment, it had to accept the agency construction, provided only that it did not pass the bounds of reason.

Gray v. Powell thus lays down the doctrine that, on review, an administrative construction of a statutory term like "producer" will be upheld if it is rational even though the court might well have construed the term differently on its own independent judgment. Chief Justice Vinson, in a later case applying the *Gray v. Powell* doctrine, explained: "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The 'reviewing court's function is limited.' All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis in law.' "[21]

Scope of Review

To enable the reader adequately to understand the effect of *Gray v. Powell* upon the law of judicial review of administrative action, an introductory word must first be said about the scope of review as it had been developed before the doctrine of that case was articulated.

The question of the scope of review has been a crucial one in American administrative law. Until a comparatively recent time, indeed, the issue of proper scope was a highly controversial one. But now, as Professor Davis puts it: "The long debate about *de novo* review versus restricted review is about ended; the Ben Avon and Crowell cases are of little interest except as history; extremists have moved from both ends toward the middle; and the substantial-evidence rule now dominates nearly all judicial review of administrative action in the federal courts."[22]

The fact that present-day discussions of the scope of review are no longer dominated by the heat of partisan controversy does not, however, mean that that question is now of only academic importance. The revelation by Professor Davis of his own mental

[21] Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143 at 153-154, 67 S.Ct. 245 (1946).

[22] DAVIS, ADMINISTRATIVE LAW 868 (1951). The cases referred to by Professor Davis are Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527 (1920), and Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285 (1932).

processes in writing up the subject for his treatise on administrative law is highly significant in this respect. "The easy supposition," he has stated, "was that the book . . . would include a mere summary of the law concerning scope of review. But the preparation of what started out to be such a summary has led to the surprising discoveries that the heart of the scope-of-review problem as of 1950 is inadequately treated by the literature and that few branches of administrative law are more challenging."[23]

The basic importance of scope of review lies in the fact that the extent of judicial inquiry in particular cases may determine whether or not full effect is given to the legislative purpose in creating administrative agencies. "One of the principal reasons for the creation of such agencies is to secure the benefit of special knowledge acquired through continuous experience in a difficult and complicated field."[24] If the review of administrative determinations were to be very broad, with the reviewing court deciding the case de novo on its independent judgment, "administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. It would destroy the values of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications."[25]

We should not forget that "in the whole of administrative law the functions that can be performed by judicial review are fairly limited."[26] The role of the courts in this field "is to serve as a check on the administrative branch of government — a check against excess of power and abusive exercise of power in derogation of private right."[27] The judicial function is thus one of control: we can expect judicial review to check — not to supplant — administrative action. The province of the judge is to confine the administrator within the bounds of legality, not to determine for himself the wisdom of challenged administrative action.

At the same time, the limitations imposed on the scope of inquiry of the reviewing court must not go so far as to prevent full judicial scrutiny of the question of legality. If that question cannot be properly explored by the judge, the right to judicial review

23 Davis, "Scope of Review of Federal Administrative Action," 50 COL. L. REV. 559 (1950).

24 SEC v. Associated Gas and Electric Co., (2d Cir. 1938) 99 F. (2d) 795 at 798.

25 REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 91-92 (1941).

26 Id. at 76.

27 Ibid.

can become but an empty form. "It makes judicial review of administrative orders a hopeless formality for the litigant. . . . It reduces the judicial process in such cases to a mere feint."[28]

Law-fact distinction. The scope of review of administrative action has been dominated by the distinction between "law" and "fact" — a distinction that is fundamental throughout our law and that has, indeed, been the keystone upon which our whole system of appellate review has been built. As an English administrative lawyer put it, in this field, "it is generally agreed that the jurisdiction of superior Courts should be invoked only on questions of law — a principle which is already familiar in other spheres, such as appeals to the Court of Criminal Appeal and cases stated to the High Court by justices and other authorities of inferior jurisdiction. To re-open all disputed issues of fact might lead to endless litigation, with no very satisfactory conclusion in the end."[29] As applied to the field of administrative law, this separation of law and fact sounds attractively simple. "The administrative tribunal would find the facts and the courts would not interfere unless the absence of evidence or the perversity of the finding required them to intervene."[30]

The approach of our courts to the scope of review has been based almost entirely upon the distinction between questions of *law* and questions of *fact.* As to the latter, the primary responsibility of decision is with the administrative expert. It is only the former that are to be decided judicially. "If the action rests upon an administrative determination — an exercise of judgment in an area which Congress has entrusted to the agency — of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law."[31]

From a historical point of view, the use of the law-fact distinction in the field of review of administrative action was a wholly natural development. When Anglo-American courts came to be confronted with cases involving challenges to the legality of agency

28 Jackson, J., dissenting, in SEC v. Chenery Corp., 332 U.S. 194 at 210, 67 S.Ct. 1575 (1947).

29 ALLEN, LAW AND ORDERS 159 (1945).

30 CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW 108 (1941).

31 SEC v. Chenery Corp., 318 U.S. 80 at 94, 63 S.Ct. 454 (1943).

acts, they had at their disposition the fully developed law of appellate review of lower courts as well as that governing the respective roles of judge and jury — both of which were grounded entirely on the law-fact distinction. In evolving the law of agency review, it was not suprising that our judges proceeded, so far as possible, by analogy with the principles that had been constructed so meticulously by their predecessors in the above-mentioned fields, and particularly that of appellate court review. In their origins, indeed, cases involving review of agency action by the Court of King's Bench appear to have been treated exactly like cases involving review of inferior courts by that tribunal. The prerogative writs themselves, which became the basic non-statutory method of securing review of administrative acts in the common-law world,[32] were originally available only to control inferior courts.[33] When those same writs began to be used as a means of controlling administrative agencies, it was natural for them to be governed by the rules that applied when they were issued against lower courts — including that limiting the scrutiny of the reviewing court to questions of law.

The law-fact distinction, whose penetration into the law of review of administrative action can thus be explained historically, may also be said to have a significant practical basis in the field of administrative law. A theory of review grounded upon the distinction rests upon a division of labor between judge and administrator, giving full play to the particular competence of each. Questions of law are to be decided judicially; for the judge, both by training and tradition, is best equipped to deal with them. "Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions."[34] These considerations do not apply to the judicial review of the factual issues arising out of administrative determinations. There, the advantages of *expertise* are with the administrator. The fact "findings of an expert commission have a validity to which no judicial examination can pretend; the decision, for instance, of the New York Public Service Commission that a gas

[32] Under Degge v. Hitchcock, 229 U.S. 162, 33 S.Ct. 639 (1913), it should be noted, certiorari, the most commonly used of the prerogative writs in this field, is not available in the federal courts for the review of administrative action.

[33] See Rex v. Electricity Commissioners, [1924] 1 K.B. 171 at 205.

[34] LANDIS, THE ADMINISTRATIVE PROCESS 152 (1938). Emphasis omitted.

company ought to provide gas service for a given district is almost inevitably more right than a decision pronounced by the Courts in a similar case."[35]

Review of facts. The division of labor just referred to is not, however, inexorably carried out, for constitutional principles require some judicial review upon fact as well as law. "An approach to the problem of judicial review cannot neglect the fact that its essence springs from the Anglo-American conception of the 'supremacy of law' or 'rule of law,' as it is variously called."[36] That concept calls for a judicial examination of the administrative determination to see that it has an evidentiary basis. An administrative finding of fact that is not supported by evidence cannot be said to have been within the jurisdiction conferred upon the agency. Or, to put it another way, "the question whether the administrative finding of fact rests on substantial evidence . . . is really a question of law, for a finding not so supported is arbitrary, capricious and obviously unauthorized."[37]

Nor should it be assumed that judicial inquiry into the evidentiary basis of administrative fact findings is inconsistent with the law-fact distinction upon which, we have seen, the scope of review of agency action has been grounded. The question of evidentiary support itself is treated by the courts as one of law and hence one to be determined by the court upon review. An agency finding of fact made without any evidentiary basis is arbitrary and ultra vires; the courts can consequently intervene since the primary purpose of judicial review in our system is to keep administrative agencies within the bounds of the powers delegated to them. That this is, in fact, the approach of our courts is shown by *Florida East Coast Railway Co. v. United States.*[38] There the Interstate Commerce Commission had considered in the same proceeding the question of reducing the rates on three railroads running through the state of Florida. Although the evidence showed reduced costs on only two of the lines, the commission had included all three in its rate-reducing order. The Court set aside the order in so far as it affected the third line, saying that there was no evidence justifying that part of the order, for testimony

35 LASKI, A GRAMMAR OF POLITICS, 4th ed., 393 (1938).

36 LANDIS, THE ADMINISTRATIVE PROCESS 123 (1938).

37 REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 88 (1941).

38 234 U.S. 167, 34 S.Ct. 867 (1914).

as to the condition of traffic on certain lines did not necessarily tend to establish similar conditions on another railroad in regard to which no testimony was given. In the course of his opinion, Chief Justice White declared, "While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding, and may not be re-examined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law, which it is the duty of the courts to examine and decide."[39]

Though, as has just been shown, the reviewing court must thus reexamine agency fact findings, this does not mean that such findings are to be treated like findings of law. On the contrary, there is still an essential difference between the treatment, on review, of questions of fact and questions of law. If a question of law is at issue, the reviewing court must determine it upon its own independent judgment. Where the challenged finding is, on the other hand, one of fact, the court cannot substitute its judgment for that of the administrator. It is not for the reviewing court to determine the correctness of the administrative factual determination upon its own independent judgment. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."[40] The court has only to see if the finding is supported by evidence; it is not concerned with the weight of the evidence. "In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority."[41]

It is interesting to note that, although the law of review of administrative agencies developed, as we saw, from that governing appellate review of inferior courts, there is little doubt but that the scope of review of agency findings of fact became narrower than that of similar findings by a trial judge. The fact finding of an agency came to be treated, for purposes of the scope of review, substantially like a special jury verdict and, under the law de-

[39] Id. at 185. For a similar English approach, see Bean v. Doncaster Amalgamated Collieries, Ltd., [1944] 2 All E.R. 279 at 284.

[40] Mississippi Barge Line Co. v. United States, 292 U.S. 282 at 286-287, 54 S.Ct. 692 (1934).

[41] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 at 51, 56 S.Ct. 720 (1936).

veloped by the federal courts, "evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding."[42] Justice Reed said, in a significant case, "Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' "[43] Where an administrative agency is involved, however, its findings of fact must be upheld if they are supported by *substantial evidence.*

How does the substantial-evidence rule, which dominates the scope of review of administrative findings of fact compare with the "clearly erroneous" test which applies to appellate review of the findings of a trial judge? "A finding is 'clearly erroneous,' " said Justice Reed, in the case already referred to, "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[44] Prior to the Administrative Procedure Act of 1946,[45] review governed by the test of substantial evidence was clearly narrower than this. Indeed, under a prevalent pre-APA interpretation of the substantial-evidence rule, "if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored."[46] Under this interpretation, substantial evidence meant, in effect, such evidence as, *standing alone,* would be sufficient to support a finding. As Justice Frankfurter expressed it, with regard to review of the

42 Orvis v. Higgins, (2d Cir. 1950) 180 F. (2d) 537 at 540. This leads Judge Frank to declare: "A wag might say that a verdict is entitled to high respect because the jurors are inexperienced in finding facts, an administrative finding is given high respect because the administrative officers are specialists (guided by experts) in finding a particular class of facts, but, paradoxically, a trial judge's finding has far less respect because he is blessed neither with jurors' inexperience nor administrative officers' expertness." Ibid.

43 United States v. Gypsum Co., 333 U.S. 364 at 395, 68 S.Ct. 525 (1948).

44 Ibid.

45 60 Stat. L. 237 (1946), 5 U.S.C. (1952) §1001.

46 REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 210-211 (1941).

National Labor Relations Board, "It is fair to say that by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings."[47]

It was dissatisfaction with this restricted interpretation of the substantial-evidence rule, as much as anything else, that led to the enactment of the Administrative Procedure Act. By inserting an express direction in section 10 (e) of that act to reviewing courts to consider the "whole record" in determining whether administrative findings are supported by substantial evidence, the draftsmen of the 1946 act sought to do away with the pre-APA judicial tendency just discussed. And in the now-celebrated case of *Universal Camera Corp. v. National Labor Relations Board,*[48] the Supreme Court held that the sponsors of the APA meant just what they said in the "whole record" requirement at the end of section 10 (e). "Whether or not it was ever permissible," reads the Court's opinion on this point, "for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement . . . that courts consider the whole record."[49]

What, then, does the substantial-evidence rule mean today under the Administrative Procedure Act? According to one commentator, "underlying the vexed word 'substantial' is the notion or sense of fairness. . . . The concept of fairness relates to the attitude of judging. I would say, then, that the judge may—indeed must—reverse if as he conscientiously sees it the finding is not fairly supported by the record; or to phrase it more sharply, the judge must reverse if he cannot conscientiously escape the conclusion that the finding is unfair."[50]

47 Universal Camera Corp. v. NLRB, 340 U.S. 474 at 478, 71 S.Ct. 456 (1951).
48 340 U.S. 474, 71 S.Ct. 456 (1951).
49 Id. at 487-488.
50 Jaffe, "Judicial Review: 'Substantial Evidence on the Whole Record,'" 64 HARV. L. REV. 1233 at 1239 (1951).

When, under this view, is an agency finding unfair? It would seem, to the present writer, that that is the case when the finding is not a reasonable one in the light of the evidence in the whole record. Substantial evidence is hence such evidence as might lead a reasonable man to make the finding at issue. The evidence in support of a fact finding is substantial when from it an inference of the existence of the fact may be drawn reasonably.[51] In such a case, the reviewing court must uphold the finding, even if it would have drawn a contrary inference from the evidence. "Choice lies with the Board and its finding is supported by the evidence and is conclusive where others might reasonably make the same choice."[52]

The substantial-evidence rule under the Administrative Procedure Act tests the rationality of administrative findings of fact, taking into account all the evidence on both sides. The APA brings us back to the meaning of substantial evidence declared by Chief Justice Hughes in the *Consolidated Edison* case—i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[53] The substantial evidence test is thus a test of the *reasonableness,* not of the *rightness,* of agency findings of fact.

Law or fact? With this preliminary excursus into the scope of review completed, we can return to our primary concern, namely, the doctrine of *Gray v. Powell.* The analysis of that case showed us that, under its doctrine, review of the agency finding that petitioners were not "producers," within the meaning of that term in the relevant statute, was limited to the question of whether such finding was reasonable. But, we have just seen, the question of reasonableness is also that which the court must now ask itself in reviewing administrative findings of fact. *Gray v. Powell* is so important to our administrative law precisely because it makes the scope of review of agency findings like that involved in it similar to that available over agency findings of fact. In both cases, the reviewing court can determine only whether the challenged findings possess a rational basis.

51 Matter of Stork Restaurant, Inc. v. Boland, 282 N.Y. 256 at 273, 26 N.E. (2d) 247 (1940).

52 Id. at 274.

53 Consolidated Edison Co. v. NLRB, 305 U.S. 197 at 229, 59 S.Ct. 206 (1938). See Benjamin, "Judicial Review of Administrative Adjudication: Some Recent Decisions of the New York Court of Appeals," 48 COL. L. REV. 1 at 2 (1948).

Gray v. Powell, it has just been said, applies to review of the finding at issue there the test applicable to review of agency findings of fact. Is the finding that petitioners are not "producers," however, one of fact—or even, for that matter, one that is more factual than legal in nature? The finding involved in *Gray v. Powell* was one applying the statutory term "producer" to the facts of the particular case. Such a finding, involving really the application of law to fact, has been treated by the Supreme Court both as one of law and as one of fact. The first approach is illustrated by the well-known case of *Federal Trade Commission v. Gratz.*[54] It was the first case on the power of the newly created Federal Trade Commission to restrain "unfair methods of competition" in interstate commerce. The Court there reversed the conclusion of the commission that the trade practices involved in the case constituted such "unfair" methods. The Court did not confine itself to the question whether reasonable grounds existed for the administrative conclusion. Instead, it determined upon its own independent judgment the applicability of the statutory concept. "The words 'unfair methods of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law what they include."[55]

O'Leary v. Brown-Pacific-Maxon,[56] on the other hand, treats the type of finding under discussion as one of fact. The agency there had found as a "fact" that a death for which compensation was sought had arisen "out of and in the course of employment." The Supreme Court seemed to agree that the question whether the death so arose was to be treated as a question of fact. "Doing so" said Justice Frankfurter, "only serves to illustrate once more the variety of ascertainments covered by the blanket term 'fact.' "[57] Since only a question of fact was involved, the Court held that review was to be governed by the substantial-evidence rule, as it was explained in the *Universal Camera* case.[58]

Most commentators have followed Justice Jackson and labeled findings of the type under discussion as "mixed findings of law and fact."[59] Nor can the Court's labeling of such a finding as

54 253 U.S. 421, 40 S.Ct. 572 (1920).
55 Id. at 427.
56 340 U.S. 504, 71 S.Ct. 470 (1951).
57 Id. at 507.
58 Supra note 48.
59 Dobson v. Commissioner, 320 U.S. 489 at 501, 64 S.Ct. 239 (1943).

only one of "fact" in the *Brown-Pacific-Maxon* case obscure the fact that it actually possesses both legal and factual elements. Justice Frankfurter himself seems to recognize this when he concedes that the agency conclusion at issue " . . . does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts."[60] In actuality, the designation by the Court of the finding as one of "fact" is simply a means of ensuring that its review will be governed only by the narrow scope of review associated with the substantial-evidence rule. What was involved in *Brown-Pacific-Maxon* was a judicial attempt, of the kind against which an English judge once protested, "to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on questions of pure fact. This is sought to be effected by styling the finding on a mixed question of law and fact a finding of fact."[61] It was the convenient styling of the finding at issue as one of fact by the majority of the Court in *Brown-Pacific-Maxon* that led Justice Minton, dissenting there, to declare, "I suppose the way to avoid what we said today in *Universal Camera Corp. v. Labor Board* . . . is to find facts where there are no facts, on the whole record or any piece of it."[62]

Although the administrative finding in this type of case may well be, in large part, one of fact—i.e., whether the death did arise out of and in the course of decedent's employment depends upon the factual circumstances under which the death occurred—it also involves a question of statutory interpretation. To apply the statutory term "out of and in the course of employment" to the facts of specific cases is to give concrete meaning to that term.

It is recognized that it will be denied that a finding of the type under discussion is one of statutory interpretation in the strict sense. It has been urged that the interpretation and application of statutes are two different things. In this view, interpretation properly so called includes only the determination of the proper sensible meaning of the statute. Application is the process of determining whether the facts of the particular case are within or

60 340 U.S. at 507, 71 S.Ct. 470 (1951).
61 Great Western Ry. Co. v. Bater, [1922] 2 A.C. 1 at 12.
62 340 U.S. at 510, 71 S.Ct. 470 (1951).

without that meaning.[63] Under this view, it will be said, findings of the type we are concerned with involve only the application, not the interpretation, of the relevant statute.

In the opinion of the present writer, so to differentiate interpretation from application is to make a mere dialectic distinction. A statutory term can have meaning only in its application to the particular facts of a particular case.[64] Justice Frankfurter has aptly pointed out, "Meaning derives vitality from application. Meaning is easily thwarted or distorted by misapplication."[65] Actually, the steps in the process of interpreting statutes may be divided into three parts: (1) finding or choosing the proper statute or statutes applicable; (2) interpreting the statute law in its technical sense; and (3) applying the meaning so found to the case at hand.[66]

To find out the meaning of a statutory term only in the abstract is to engage in vacuous academic exercise. It is when the meaning so found is applied to the case at hand that the statute is really being interpreted. Indeed, as one authority well puts it, the final application to a specific case is the crux of the whole process of statutory interpretation.[67]

That application really is the critical stage of the interpretive process is clear upon consideration of Austin's famous distinction between what he called "genuine" and "spurious" interpretation. The latter type, said he, involves the application of a statutory provision to a case which does not upon a proper interpretation come within the statute. "The judge applies the law to the fact, according to his opinion of the meaning; or (by a process, which is generally confounded with interpretation or construction, but which in truth is legislation) he decides according to his own notion of what the legislator ought to have established. By this extensive or restrictive interpretation *ex ratione legis,* much judiciary law grows up."[68]

What Austin was declaiming against here was judicial misapplication of statutory terms. Can it be doubted that, in cases of the kind referred to by him, application of law to fact was not

63 De Sloovère, "Steps in the Process of Interpreting Statutes," 10 N.Y. UNIV. L. Q. REV. 1 at 17 (1932).

64 NLRB v. American Ins. Co., 343 U.S. 395 at 410, 72 S.Ct. 824 (1952).

65 Trust of Bingham v. Commissioner, 325 U.S. 365 at 380, 72 S.Ct. 433 (1945).

66 De Sloovère, "Steps in the Process of Interpreting Statutes," 10 N.Y. UNIV. L. Q. REV. 1 (1932).

67 Id. at 20.

68 Id. at 19, quoting 2 AUSTIN, JURISPRUDENCE 656, 4th ed. (1873). See Pound, "Spurious Interpretation," 7 COL. L. REV. 379 (1907).

only part of interpretation of the statute, but, in many ways, its most significant part?

If an administrative agency finds that an individual is an employee of some other individual so as to make the regulatory law administered by it applicable to him, the agency appears clearly to be interpreting the statutory term "employee." Calling the agency's act mere application and not interpretation cannot change the fact that its action is giving specific meaning to the legislative language. And, if questions of statutory interpretation are to be determined by the reviewing court upon its own independent judgment, it is difficult to see how they can logically limit their review over findings claimed to misapply statutory terms. "If the appellate courts must make an independent examination of the meaning of every word in . . . legislation, on the assumption that the construction of legislative language is necessarily for the appellate courts, how can they reasonably refuse to consider claims that the words have been misapplied in the circumstances of a particular case?"[69] It was this approach that led Justice Roberts to dissent from the decision of the Court in a case applying the doctrine of *Gray v. Powell* to review of an agency finding of the existence of an employment relationship. "The question who is an employee," said he, "so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question."[70]

That the doctrine of *Gray v. Powell* is one which, in reality, applies to review of agency interpretations of their enabling legislation has been admitted (in less guarded moments perhaps) by members of the highest Court themselves. Under *Gray v. Powell,* stated Justice Black recently, "when administrators have interpreted broad statutory terms, such as here involved, we would recognize that it is our duty to accept this interpretation even though it was not 'the only reasonable one' or the one 'we would have reached had the question arisen in the first instance in judicial proceedings.' "[71]

Gray v. Powell assimilates review of questions of statutory interpretation to review of questions of fact. That is a plain statement of its effect, no matter how courts or commentators may try

[69] Trust of Bingham v. Commissioner, 325 U.S. 365 at 380, 65 S.Ct. 1232 (1945), per Frankfurter, J.

[70] NLRB v. Hearst Publications, 322 U.S. 111 at 136, 64 S.Ct. 851 (1944).

[71] Brannan v. Stark, 342 U.S. 451 at 484, 72 S.Ct. 433 (1952) (dissenting opinion).

to obscure its meaning. And it is because of its effect that *Gray v. Powell* is of such great consequence. It blurs the distinction between law and fact upon which the scope of review in our administrative law had been grounded. It drastically limits review, not only of agency findings of "fact" in the narrow, literal sense,[72] but also of agency constructions of statute-law. The latter are matters which, under the traditional theory of Anglo-American judicial review, are matters more legal than factual in nature and hence for the courts upon review. By conveniently labeling them matters of application, rather than interpretation, our courts have continued to pay lip-service to the form of the traditional theory. But the doctrine of *Gray v. Powell* tends to make the practical effectiveness of that theory a thing of the past in our administrative law.

Cases Following Gray v. Powell

The practical effects of the doctrine of *Gray v. Powell* can best be seen from an analysis of the Supreme Court decisions following it. Such analysis will be limited to the post-*Gray v. Powell* cases in the highest Court, even though it is recognized that *Gray v. Powell* itself was not the first decision applying the doctrine usually associated with its name. Actually, as Professor Davis points out, although *Gray v. Powell* is now regarded as the leading case, "it did no more than to apply what had already been unequivocally established by the Rochester case two years earlier and what in another form had been developed as early as the second decade of the century."[73] In the *Rochester case*[74] referred to (whose chief claim to fame in administrative law rests upon the fact that in it the Court discarded the so-called "negative order" doctrine as a restriction upon the availability of review), Justice Frankfurter had actually come close to enunciating the doctrine articulated in *Gray v. Powell*,[75] and the same was true, though to a lesser extent, of the Court's decision in *Shields v. Utah Idaho Central*

[72] SEC v. Central-Illinois Corp., 338 U.S. 96 at 126, 69 S.Ct. 1377 (1949).

[73] DAVIS, ADMINISTRATIVE LAW 882 (1951).

[74] Rochester Telephone Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754 (1939).

[75] In upholding an agency finding that the Rochester company was "controlled by" another telephone company, within the meaning of the relevant statute, Justice Frankfurter said, "So long as there is warrant in the record for the judgment of the expert body it must stand. . . . 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'" Id. at 145 and 146.

R. Co.[76] Yet, even if this is conceded, for our purposes, it is not necessary to deal with the pre-*Gray v. Powell* decisions. *Gray v. Powell* contains the fullest and, perhaps the best, discussion[77] of the doctrine now connected with its name and can, for that reason, conveniently be considered as the landmark case.

In analyzing the post-*Gray v. Powell* cases, one is struck by the fact that most of the decisions of the highest Court do follow the doctrine of *Gray v. Powell* when it is relevant. And this impression is strengthened by the fact that most of the apparent aberrational refusals to apply the doctrine, as we shall see in our later discussion of them, can be explained on rational grounds as not inconsistent with *Gray v. Powell.* The fact that it is generally followed is, indeed, what gives the doctrine of *Gray v. Powell* its significance. As a practical matter, it *does* limit the scope of review in most cases.

Among the cases applying the *Gray v. Powell* doctrine, few have been more important than *National Labor Relations Board v. Hearst Publications.*[78] That case involved an order by the NLRB directing respondent to bargain collectively with the newsboys who sold its papers in Los Angeles. Respondent claimed that the newsboys were not its "employees," but were instead independent contractors. Hence, it was said, the National Labor Relations Act was inapplicable. The court of appeals agreed with this view and set aside the Board's order as beyond its statutory authority.[79] The Supreme Court reversed, holding that the lower court had erred in considering independently the correctness of the agency finding that the newsboys were employees. Instead, said the Court, the doctrine of *Gray v. Powell* should be applied. It is true that Justice Rutledge started by paying his formal respects to the rule that, on review, questions of statutory interpretation are for the courts. "Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is

[76] 305 U.S. 177, 59 S.Ct. 160 (1938), where the Court applied the rule of limited review to a finding that a carrier was an "interurban" electric railway within the meaning of the governing statute.

[77] Stern, "Review of Findings of Administrators, Judges, and Juries: A Comparative Analysis," 58 HARV. L. REV. 70 at 103 (1944).

[78] 322 U.S. 111, 64 S.Ct. 851 (1944).

[79] Hearst Publications, Inc. v. NLRB, (9th Cir. 1943) 136 F. (2d) 608.

to administer the questioned statute."[80] By going on to apply *Gray v. Powell,* however, he made this statement devoid of most of its practical content. "But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . The Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."[81]

It has already been emphasized that it is unreal, at least in this type of case, to dichotomize interpretation and application. The agency's application of the abstract meaning of the statutory term to the facts of the particular case was, in truth, the crucial point in the interpretive process. And yet, with regard to it, following *Gray v. Powell,* the Court held that review was to be governed by the test of reasonableness. It would seem, in fact, that Justice Rutledge himself recognized that the finding at issue was composed of both legal and factual elements, for he stated the question for the reviewing court to be whether the finding has *warrant in the record and a reasonable basis in law.* "Warrant in the record" appears to be but another way of stating the substantial-evidence rule. By his use of the term, the learned justice apparently meant that the facts found by the agency upon which its ultimate determination of the existence of an employment relationship was based had to be supported by substantial evidence, for the determination to be upheld. And, in addition, the determination itself had to have "a reasonable basis in law." This latter requirement was necessary because the application of the statutory term "employees" to the facts found involved the construction of the relevant act.

This division by Justice Rutledge of the finding at issue in the *Hearst* case into its factual and legal elements is one with which, it is believed, few administrative lawyers would disagree. And the same is true of his holding that review of the factual elements is to be governed by what is, more or less, the substantial-evidence rule. More difficulty is caused, however, by his application of the test of reasonableness to what is really a question of statutory construction. It is enough, it might be said, if deference to the agency

80 322 U.S. 111 at 130-131, 64 S.Ct. 851 (1944).

81 Id. at 131. For a decision following the Hearst case, see NLRB v. Atkins & Co., 331 U.S. 398, 67 S.Ct. 1265 (1947).

is paid on the facts found by it which underlie its ultimate finding. But, as far as the question of interpretation involved in such finding is concerned, the reviewing court should determine whether it is right, not merely reasonable, as a matter of law. Yet this is exactly what the doctrine of *Gray v. Powell,* as it was applied in the *Hearst* case, does not permit the court to do.

Separation of the type just discussed of administrative findings such as those we are concerned with into their legal and factual elements (with the former for the courts and only the latter for the agencies) was expressly denied to be the basis of the law of review in *Dobson v. Commissioner,*[82] where the application of the *Gray v. Powell* doctrine probably achieved its greatest notoriety.[83] The *Dobson* case dealt with review of a decision of the Tax Court holding that the recovery by a taxpayer—in respect of a loss (on a sale of stock) deducted and allowed on returns for an earlier year, adjustment of the tax liability for which was barred by limitations—was not taxable income where it found that, viewing as a whole the transactions out of which the recovery arose, the taxpayer had realized no economic gain and had derived no tax benefit from the loss deduction. The court of appeals reversed, stating that as matter of law the recoveries were neither return of capital nor capital gain, but were ordinary income in the year received.[84] The Supreme Court, in deciding that the decision of the Tax Court should be upheld, declared that review of its findings should be governed by the rules that are applicable in the case of ordinary administrative agencies, and particularly by the doctrine of *Gray v. Powell.* As Justice Jackson put it in his opinion, "all that we have said of the finality of administrative determination in other fields is applicable to determinations of the Tax Court. Its decision, of course, must have 'warrant in the record' and a reasonable basis in the law. But 'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' "[85]

In a significant and oft-cited portion of his opinion, Justice Jackson went on to reject the notion that the reviewing court can, in this type of case, restrict the rule of limited review to the facts

82 320 U.S. 489, 64 S.Ct. 239 (1943).

83 Nathanson, "Administrative Discretion in the Interpretation of Statutes," 3 VAND. L. REV. 470 at 471 (1950).

84 Harwick v. Commissioner, (8th Cir. 1943) 133 F. (2d) 732.

85 320 U.S. 489 at 501, 64 S.Ct. 239 (1943).

upon which the agency determination is based, reviewing the determination itself broadly as involving a construction of the relevant statute. On the contrary, said Justice Jackson, review of the entire finding must be governed by the rule of limited review—"when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand."[86]

What was meant by this statement is explained by Justice Frankfurter in a later opinion. According to him, "Congress did not authorize review of all legal questions upon which the Tax Court passed. It merely allowed modification or reversal if the decision of the Tax Court is 'not in accordance with law.' But if a statute upon which the Tax Court unmistakably has to pass allows the Tax Court's application of the law to the situation before it as a reasonable one—if the situation could, without violence to language, be brought within the terms under which the Tax Court placed it or be kept out of the terms from which that Court kept it—the Tax Court cannot in reason be said to have acted 'not in accordance with law.' In short, there was no 'clear-cut mistake of law' but a fair administration of it."[87]

If this is what the *Dobson* decision stands for, it would seem that what Justice Jackson meant by the "clear-cut mistake of law" which could lead to reversal of the Tax Court was simply a finding that did not have a reasonable basis in law—which is, of course, merely to restate the doctrine of *Gray v. Powell.* Once it is admitted that the application of the statuory term or concept by the Tax Court was an allowable—i.e., reasonable—one, the function of the reviewing court is exhausted.[88]

Dobson v. Commissioner, like the other cases we have been discussing, illustrates the fact that the doctrine of *Gray v. Powell* applies to limit review of findings which involve determination of questions of law. The Tax Court finding that the particular transaction did not constitute taxable income clearly was based upon that tribunal's answer to the legal question of what constituted taxable "income" within the relevant provision of the revenue law. Justice Jackson, it should be noted, expressly denied this, asserting that "The error of the court below consisted of treating as a rule of law what we think is only a question of proper

[86] Id. at 502.
[87] Trust of Bingham v. Commissioner, 325 U.S. 365 at 381-382, 65 S.Ct. 1232 (1945).
[88] Id. at 382.

tax accounting."[89] The assertion by the Court cannot, however, as Professor Jaffe points out, change the nature of the question involved. "The accountant may treat a stock dividend as income or not, but the question whether a particular stock dividend is taxable income does not cease to be a question of law merely because it involves an 'accounting concept.' "[90] The whole point about the *Dobson* case is that it makes no difference whether Justice Jackson or Professor Jaffe is right on the question of proper classification. "If a question becomes a reviewable question in tax cases because, abstractly considered, it may be cast into a 'pure question of law,' it would require no great dialectical skill to throw most questions which are appealed from the Tax Court into questions of law independently reviewable by the Circuit Court of Appeals."[91] *Gray v. Powell,* as applied in *Dobson,* bars the reviewing court from considering anything more than the reasonableness of the finding—regardless of whether or not the finding is really one which answers a question of law.

The doctrine of *Gray v. Powell,* in the words of one commentator, led an uneasy existence in tax administration to which the *Dobson* case had applied it, until it was finally banished from the field by congressional action.[92] But this has had no effect upon the doctrine in other branches of administrative law, where it has continued to be applied in the majority of cases where it is relevant. Among such cases, perhaps the most numerous have been those involving review of the Interstate Commerce Commission—where, it should be noted, the doctrine of limited review of findings of the type we are concerned with actually had its pre-*Gray v. Powell* origin.[93] Many of the ICC cases have concerned the action of the commission in granting or denying a certificate of public convenience and necessity as a common carrier by motor vehicle under the so-called "grandfather clause" of the Motor Carrier Act

89 320 U.S. 489 at 506-507, 64 S.Ct. 239 (1943).

90 Jaffe, "Judicial Review: 'Substantial Evidence on the Whole Record,' " 64 HARV. L. REV. 1233 at 1259 (1951).

91 Trust of Bingham v. Commissioner, 325 U.S. 365 at 382, 65 S.Ct. 1232 (1945).

92 Nathanson, "Administrative Discretion in the Interpretation of Statutes," 3 VAND. L. REV. 470 (1950). Section 1141 (a) [now §7482] of the Internal Revenue Code was amended in 1948 so that review of the decisions of the Tax Court now proceeds in the same manner and to the same extent as review of decisions of the federal district courts in civil actions tried without a jury. This changes the rule of the Dobson case, insofar as review of the Tax Court is concerned.

93 See, e.g., the Rochester and Shields cases, cited supra notes 74 and 76, or, for an earlier case, Pennsylvania Co. v. United States, 236 U.S. 351 at 361, 35 S.Ct. 370 (1915).

of 1935. It provides for the issuance of a certificate by the commission to a carrier which "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route . . . for which application is made and has so operated since that time . . . except . . . as to interruptions of service over which the applicant had no control,"[94] without the need for such carrier to submit any proof that public convenience and necessity will be served by its operation or for any further proceedings. In effect, this provision gives those who were in operation as motor carriers at the time the act was passed a right to the automatic grant of a license to continue their operations. "An applicant for a grandfather certificate need not prove public convenience and necessity; he is entitled to a certificate, as a matter of right, upon proof of substantial bona fide operations on and continuously since the statutory date."[95]

The Supreme Court has held, in a number of cases, that review of Interstate Commerce Commission decisions under the "grandfather clause" is governed by the *Gray v. Powell* doctrine. "The function of determining 'grandfather' rights . . .," Justice Jackson has stated, "is not unlike the function dealt with in *Gray v. Powell* . . . in which we said that Congress could have legislated specifically as to individual exemptions but 'found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable adjustment of the conflicting interests. . . .' We held that this delegation will be respected and that, unless we can say that a set of circumstances deemed by the Commission to bring a particular applicant within the concept of the statute 'is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed'. . . ."[96] And, acting in accordance with this view, the Court has applied the doctrine of *Gray v. Powell* to ICC findings in "grandfather clause" cases that an applicant was in "bona fide" operations as a motor carrier,[97] that such applicant was under the "control" of a certifi-

[94] 49 Stat. L. 551 (1935), 49 U.S.C. (1952) §306.

[95] Motor Freight Express v. United States, (D.C. Pa. 1954) 119 F. Supp. 298 at 303.

[96] Dissenting, in United States v. Carolina Carriers Corp., 315 U.S. 475 at 490, 62 S.Ct. 722 (1942). It should be noted that, despite the implication to the contrary in the dissent, the majority did not refuse to follow the rule of Gray v. Powell, holding only that the challenged ICC order was not supported by adequate findings.

[97] United States v. Carolina Carriers Corp., 315 U.S. 475, 62 S.Ct. 722 (1942); Alton R. Co. v. United States, 315 U.S. 15, 62 S.Ct. 432 (1942).

cated carrier,[98] and that an applicant was not a "contract carrier" within the meaning of the statute.[99]

Indicating how far the doctrine of *Gray v. Powell* goes in practice are those decisions upholding ICC "grandfather clause" findings that interruptions in service were not such as to be beyond applicants' control. The statute, already quoted, provides that, for "grandfather" rights to be asserted, the applicant must have given continuous service as a motor carrier from June 1, 1935 to the time of the application, except for interruptions over which the carrier "had no control." In *Gregg Cartage Co. v. United States,*[100] the Interstate Commerce Commission had held that an interruption of service caused by the carrier's bankruptcy was not one over which it had no control within the meaning of the act and had consequently denied the application. The commission based its refusal to find that the applicant 'had *no* control' over the interruption of service upon the fact that such interruption followed upon an adjudication of bankruptcy resulting from the unsuccessful conduct of its business affairs, and did not go back of the adjudication to find and give detailed consideration to the particular causes of the failure. The applicant contended that this was error, and for a rule requiring that in every case of this sort the commission must trace out the chain of causation and weigh the bankrupt's judgment against the pressures of circumstance. The Court upheld the commission, declaring that it was warranted in holding that the interruption because of bankruptcy was not one over which the applicant had no control within the meaning of the Motor Carrier Act. "Whether or not this assumption squares with philosophical doctrine, or even with reality, is not for our determination."[101]

There was a strong dissent by Justice Douglas, who asserted that the Interstate Commerce Commission was wrong in construing the statute as not requiring it to go back of the bankruptcy adjudication to determine whether the cause of the failure was really within the control of the carrier. The facts of this case,

98 Ziffrin, Inc. v. United States, 318 U.S. 73, 63 S.Ct. 465 (1943), under a statutory provision denying "grandfather" rights to carriers so controlled.

99 United States v. Rosenblum Truck Lines, 315 U.S. 50, 62 S.Ct. 445 (1942).

100 316 U.S. 74, 62 S.Ct. 932 (1942).

101 Id. at 80. Compare McAllister Line v. United States, 327 U.S. 655, 66 S.Ct. 731 (1946), where an ICC finding that interruptions of service because of the depression and the war were due to circumstances other than those over which the carrier had no control was upheld.

said he, show clearly the error of the ICC's construction. Those facts, as summarized by the dissent, are as follows: During the year 1936 the applicant was insured against public liability and property damage by the Central Mutual Insurance Co. Hearing rumors that Central Mutual was in financial difficulties and was not paying claims, applicant dropped its policy in December 1936 and placed its insurance with another company. On January 11, 1937, Central Mutual was adjudged a bankrupt and ceased payment of all claims. In the fall of 1937, applicant was forced to pay several substantial damage claims arising from accidents during the period when its insurance policy was in effect with Central Mutual. These payments seriously impaired its working capital. Furthermore, applicant was confronted with approximately 175 additional claims for personal injury and property damage. These were estimated at about $200,000 and arose during the period when applicant was insured by Central Mutual. Applicant settled some of these claims. It was impossible, however, to satisfy the demands of all of these claimants. Receivership followed and on its heels came bankruptcy. "There is not the slightest evidence in this record of any negligence, dereliction, or mismanagement on the part of applicant. It is undisputed that its failure was due to the failure of its insurer. And there is no evidence in this record that it did not exercise due care in the selection of that insurer."[102]

After analyzing the facts in the case, it is difficult not to agree with Justice Douglas that the commission was wrong in its construction of the act. But, unless its finding is not only wrong, but also unreasonable, it must under *Gray v. Powell* be upheld. Interestingly enough, Justice Douglas, who has usually been a consistent adherent of the *Gray v. Powell* doctrine,[103] implied, in his dissent, that that doctrine was being pushed too far in this case. "I would have supposed," said he, "that the question of 'control' was 'an issue of fact to be determined by the special circumstances of each case'. . . . That would mean that 'So long as there is warrant in the record for the judgment of the expert body it must stand.' . . . But that is quite different from acceding to the suggestion that the non-technical word 'control' may be interpreted

[102] 316 U.S. 74 at 86, 62 S.Ct. 932 (1942).

[103] See, e.g., Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 at 689, 74 S.Ct. 794 (1954); NLRB v. Highland Park Co., 341 U.S. 322 at 327, 71 S.Ct. 758 (1951). And the same has been true of Black, J., who joined in the dissent. See, e.g., Brannan v. Stark, 342 U.S. 451 at 484, 72 S.Ct. 433 (1952).

in a way which goes against all human experience and which does violence to its ordinary and accepted meaning."[104] If Justice Douglas means by this that the agency finding is not only not right but also not reasonable, then his refusal to uphold the commission is not inconsistent with *Gray v. Powell,* for, under it, the reviewing court *can* inquire into reasonableness. If, however, he is implying that the doctrine of limited review is out of place here because of the nature of the particular finding — i.e., it involves, as he says, the interpretation of a "non-technical word" — that is quite another thing. It is to this very type of finding that *Gray v. Powell* does apply. And the doctrine of that case justifies the majority of the Court in upholding the agency as it did here.[105]

It is not, it is felt, necessary to analyze in detail the other Supreme Court decisions applying the doctrine of *Gray v. Powell* — which range from the celebrated second *Chenery* case[106] to a number of less noted decisions.[107] Before concluding this portion of this paper, something should, however, be said of one aspect of the *Gray v. Powell* doctrine that is usually not referred to by courts and commentators. And this is the fact that the *Gray v. Powell* type of finding is by its very nature one upon which the statutory jurisdiction of the particular agency may depend.

In referring to this aspect of the *Gray v. Powell* doctrine, the present writer has no intention (in this paper, at any rate) of tilting a lance for the doctrine of "jurisdictional fact," as sponsored by *Crowell v. Benson,*[108] with all the casuistic difficulties spawned by it.[109] At the same time, it cannot be denied that, where an

[104] 316 U.S. 74 at 85, 88, 62 S.Ct. 932 (1942).

[105] It also seems hard to justify Justice Douglas' dissent if, as he says, the finding at issue is one of "fact," since it clearly seems supported by "substantial evidence" under the pre-Administrative Procedure Act interpretation of that term.

For other cases applying Gray v. Powell to ICC findings, see McLean Trucking Co. v. United States, 321 U.S. 67 at 91, 64 S.Ct. 370 (1944); Board of Trade v. United States, 314 U.S. 534, 62 S.Ct. 366 (1942).

[106] SEC v. Chenery Corp., 332 U.S. 194, 67 S.Ct. 1575 (1947) (finding that reorganization plan was not "fair and equitable").

[107] Such decisions, other than those dealt with in other portions of this article, include Howell Chevrolet Co. v. NLRB, 346 U.S. 482, 74 S.Ct. 214 (1953) (finding that petitioner was engaged in "commerce"); Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 67 S.Ct. 801 (1947) (finding that death "arose out of and in the course of employment"); Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 67 S.Ct. 245 (1946) (finding that there was a "labor dispute in active progress"). And see NLRB v. Denver Building Council, 341 U.S. 675 at 692, 71 S.Ct. 943 (1951); Switchmen's Union v. National Mediation Board, 320 U.S. 297 at 321, 64 S.Ct. 95 (1943).

[108] 285 U.S. 22, 52 S.Ct. 285 (1932).

[109] So characterized by Frankfurter, J., concurring, in Estep v. United States, 327 U.S. 114 at 142, 66 S.Ct. 423 (1946).

agency misapplies the statute upon which its power rests, it may well be acting beyond its authority. Proper administration of any statutory scheme presupposes proper application of the terms and concepts employed in the relevant legislation. Misapplication of a key statutory term may well enable the agency to act in excess of its jurisdiction.[110] If an agency like the National Labor Relations Board is vested with authority to prohibit unfair labor practices committed by employers against their employees, its very power to act is dependent upon the existence of the employment relationship. To limit review of the Board's application of the statutory term "employee" is, in effect, to limit review on the jurisdictional question.[111] This is what application of the *Gray v. Powell* doctrine does in a great many cases.

That this is, in fact, the effect of *Gray v. Powell* may be seen from most of the cases just discussed, as well as from *Gray v. Powell* itself. In *Gray v. Powell,* if petitioners were actually "producers" consuming their own product, they were exempt from the statutory scheme of regulation and the agency concerned had no authority over them. In the *Hearst* case,[112] if the newsboys were not "employees," the NLRB had no jurisdiction over their employer, and was consequently without power to order him to comply with the Labor Act.[113] And the same is true in other cases where *Gray v. Powell* is applied.[114] Indeed, it is difficult not to conclude that the statutory jurisdiction of an administrative agency is always dependent upon proper application of the terms and concepts contained in its enabling legislation. Yet, under the *Gray v. Powell* doctrine, such application by the agency will be reviewed no more broadly than the agency's findings of pure fact. As Justice Murphy has put it, with regard to review of a Federal Power Commission finding that a company was a "public utility" and hence subject to its orders under the relevant act, "The Commission . . . has the duty in the first instance of interpreting and applying these terms to the factual situation confronting it. A

110 Compare DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 307 (1927).

111 It is not necessary here to discuss the classification of Brandeis, J., in his famous dissent in Crowell v. Benson, 285 U.S. 22 at 85, 52 S.Ct. 285 (1932), and decide whether findings of this type are "jurisdictional" or only "quasi-jurisdictional." The plain fact is that the agency power to act turns upon such a finding.

112 Supra note 78.

113 And this was true as well in NLRB v. Atkins & Co., 331 U.S. 398, 67 S.Ct. 1265 (1947), and Packard Motor Co. v. NLRB, 330 U.S. 485, 67 S.Ct. 789 (1947).

114 See, e.g., Howell Chevrolet Co. v. NLRB, 346 U.S. 482, 74 S.Ct. 214 (1953); Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 67 S.Ct. 801 (1947); Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 67 S.Ct. 245 (1946).

court's function in reviewing this jurisdictional determination is necessarily limited to ascertaining whether that determination has warrant in the record and a reasonable basis in law, giving due weight to the fact that the Commission is an expert body designated by Congress and specially equipped to grapple with the highly technical problems arising in this field."[115]

One who is familiar with the dissenting opinion of Justice Brandeis in *Crowell v. Benson*[116] — the famous case enunciating the rule that there must be full review of jurisdictional findings — must agree that there are strong practical arguments in favor of applying the doctrine of limited review even to findings upon which agency power to act depends. At the same time, it should clearly be recognized that the doctrine of *Gray v. Powell* does have the effect of restricting review of administrative statutory jurisdiction. And this is inconsistent with the basic theory of *ultra vires* upon which the law of judicial review has been grounded in the Anglo-American world.[117] "An agency may not finally decide the limits of its statutory power," the Supreme Court has asserted. "That is a judicial function."[118] Under the doctrine of *Gray v. Powell,* however, judicial review of jurisdiction may lose much of its practical content. "Where the question of jurisdiction depends, as it often does, on [the application of statutory terms] and where the Federal courts apply their version of the 'substantial evidence' rule, which often signifies something falling far short of the weight of the evidence, the ultimate benefits of judicial review of the question of jurisdiction may be little more than pro forma."[119]

The dangers inherent in applying the doctrine of *Gray v. Powell* to jurisdictional findings can be illustrated by *Packard Motor Co. v. National Labor Relations Board,*[120] where the Board

115 Dissenting, in Connecticut Light and Power Co. v. Federal Power Commission, 324 U.S. 515 at 537, 65 S.Ct. 749 (1945). It should be pointed out that the majority decision in this case was not contrary to Gray v. Powell. The Court held only that the FPC had misread applicable court decisions [as had happened in the first Chenery case, SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454 (1943)], and that the commission decision was not clear as to its basis on the jurisdictional issue.

116 285 U.S. 22 at 65, 52 S.Ct. 285 (1932).

117 See DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 307 (1927). In England, it should be noted, there is still full review of jurisdictional findings. See GRIFFITH AND STREET, PRINCIPLES OF ADMINISTRATIVE LAW 208-211 (1952).

118 Social Security Board v. Nierotko, 327 U.S. 358 at 369, 66 S.Ct. 637 (1946).

119 Ward v. Keenan, 3 N.J. 298 at 303, 70 A. (2d) 77 (1949). The original report reads "questions of fact," instead of the language herein inserted in brackets, but Chief Justice Vanderbilt's reasoning applies as well to agency applications of law to fact.

120 330 U.S. 485, 67 S.Ct. 789 (1947).

had decided that the foremen employed by appellant company constituted an appropriate bargaining unit and had certified their union as the exclusive bargaining representative. The company asserted that foremen were not "employees" entitled to the advantages of the Labor Act, and refused to bargain with the union.

The challenged finding of the Board is the same as that involved in the *Hearst* case[121] and is, like it, "jurisdictional," in that the act under which the Board operates is not applicable in the absence of the "employer-employee" relationship. Under the *Gray v. Powell* doctrine, the scope of review here, like that in *Hearst,* should be limited to the question of reasonableness, and this, in effect, is the theory of review applied by the majority of the Court. "There is clearly substantial evidence in support of the determination that foremen are an appropriate unit by themselves," said Justice Jackson, "and there is equal evidence that, while the foremen included in this unit have different degrees of responsibility and work at different levels of authority, they have such a common relationship to the enterprise and to other levels of workmen that inclusion of all such grades of foremen in a single unit is appropriate. Hence the order insofar as it depends on facts is beyond our power of review. . . . Whatever special questions there are in determining the appropriate bargaining unit for foremen are for the Board, and the history of the issue in the Board shows the difficulty of the problem committed to its discretion. We are not at liberty to be governed by those policy considerations in deciding the naked question of law whether the Board is now, in this case, acting within the terms of the statute."[122]

Yet, wholly apart from the question of whether such foremen should be encouraged to organize for collective bargaining, it would seem that this is the type of case where review limited by the *Gray v. Powell* doctrine may be too narrow. The Board, by its finding on the existence of the "employer-employee" relationship, has extended the benefits of a labor statute to a group of supervisory employees who are not expressly covered by the act, and who have in the past normally been identified with the in-

121 Supra note 78.

122 330 U.S. 485 at 491, 67 S.Ct. 789 (1947). According to Professor Jaffe, the Court in the Packard case considered the application of the statutory term "employee" by the agency to be a question of law. Jaffe, "Judicial Review: 'Substantial Evidence on the Whole Record,'" 64 HARV. L. REV. 1233 at 1258 (1950). It is hard to see how this view that the Court granted full review is justified, in view of Justice Jackson's express statement that the substantial evidence rule governed. See, in accord with the present writer's interpretation of Packard, DAVIS, ADMINISTRATIVE LAW 898 (1951).

terest of management. "Trade union history shows that foremen were the arms and legs of management in executing labor policies. In industrial conflicts they were allied with management. Management indeed commonly acted through them in the unfair labor practices which the Act condemns."[123] It is perhaps not too much to say that the Board has, in effect, re-written the governing statute through its interpretation of the statutory definition. "For if foremen are 'employees' within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents — indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management, with the exception of the directors. If a union of vice-presidents applied for recognition as a collective bargaining agency, I do not see how we could deny it and yet allow the present application."[124]

This is not to say, of course, that supervisory employees such as those involved in the *Packard* case should not be permitted to bargain collectively. "What I have said does not mean that foremen have no right to organize for collective bargaining."[125] But apart from the merits, one wonders whether the administrative determination that the protection of the act should extend to such foremen should be vested with the same degree of finality as administrative findings of fact. Surely this is the type of case where the agency interpretation of the statute should be fully reviewed. Instead, under the doctrine of *Gray v. Powell,* the extension of the enabling legislation by the administrative body acting in pursuance of its general policy is placed in a position of finality,[126] although the Board has been "vested merely with the authority of general words of power."[127]

Cases Not Following Gray v. Powell

"If the doctrine expounded in such cases as Gray v. Powell, Hearst, and Chenery were consistently applied, the law would be susceptible of simple summary. But the doctrine of these cases is sometimes applied and sometimes not."[128] That is the one

123 330 U.S. 485 at 496 (1947) (dissenting opinion).
124 Id. at 494.
125 Id. at 500.
126 Subject, of course, to the rational-basis test of Gray v. Powell.
127 Lord Shaw, dissenting, in Rex v. Halliday, [1917] A.C. 260 at 300.
128 DAVIS, ADMINISTRATIVE LAW 887 (1951).

great difficulty with the doctrine of *Gray v. Powell* for administrative lawyers in this country. Even if one completely disagrees with the doctrine itself, he would still wish it to be applied consistently. If the Supreme Court, instead of adhering firmly to the doctrine which is, of course, the product of its own handiwork, incongruously refuses to follow it in cases where it seems relevant, it makes the task of the legal profession an unduly hard one. This is especially true when the Court not only does not overrule the doctrine but follows it, as we have seen, in the majority of cases.

It has already been mentioned that perhaps the primary concern of the present writer, in undertaking the reexamination in this paper of *Gray v. Powell,* has been to attempt to explain the Supreme Court decisions that have not applied its doctrine. It cannot be denied that there has been an all too distressingly large number of such decisions. Are they mere judicial aberrations, attributable only to the vagaries of the justices of the highest tribunal, or can they be explained upon a rational basis?

It is difficult to answer this question because the Supreme Court itself has never seen fit to tell us the circumstances under which it would refuse to follow the doctrine of *Gray v. Powell.* In many of these cases, indeed, when the doctrine was seemingly not adhered to, the Court did not attempt to tell us at all why it was discarding the rule of limited review or, for that matter, even to mention *Gray v. Powell* or the doctrine in its opinion. The fact that the Court has not explained why it was acting as it did in these cases has not, however, prevented students of its jurisprudence from trying to determine the factors upon which the application or non-application of the *Gray v. Powell* doctrine in specific cases might depend.

Perhaps the best-known attempt of this type was that made by John Dickinson. According to him, "Where the only ground which a court can give for its difference from the administrative body is limited to mere difference of opinion as to some matter or matters peculiar to the case, or some difference in inference from those matters, then the court should not disturb the opinion or inference of the fact-finding body unless the latter is plainly beyond the bounds of reason; for the difference is one of discretion, or 'fact.' On the other hand, where the ground of difference between court and fact-finding body can be isolated and expressed as a general proposition applicable beyond the particular case to

all similar cases, the court, if it holds the proposition one of sound law, must enforce it by overruling the administrative determination."[129]

Although this passage was actually written some fifteen years before *Gray v. Powell,* it has been referred to with approval by both courts and writers since that case was decided. A typical example is the statement by Chief Justice Stone in an important case involving the application of *Dobson v. Commissioner.* "Ordinarily," said he, "questions of reasonableness and proximity are for the trier of fact, here the Tax Court. . . . And even when they are hybrid questions of 'mixed law and fact,' their resolution, because of the fact element involved, will usually afford little concrete guidance for future cases, and reviewing courts will set aside the decisions of the Tax Court only when they announce a rule of general applicability, that the facts found fall short of meeting statutory requirements."[130] This appears to be but a restatement of the Dickinson test.

With all respect to the eminent authority just cited, analysis of the Dickinson test indicates that it does not actually explain when the Court will and when it will not follow the *Gray v. Powell* doctrine.[131] Some of the cases already referred to indicate this. In the *Gregg Cartage Co.* case,[132] for example, the Interstate Commerce Commission, in finding as it did, was really laying down a general rule that every bankruptcy arose from conditions which were within the "control" of the bankrupt within the meaning of the "grandfather clause" of the Motor Carrier Act. And, in the second *Chenery* case,[133] as Professor Davis points out,[134] the Securities and Exchange Commission, in finding that the reorganization plan was not "fair and equitable" under the relevant statutory provision, had clearly announced what the Court called "a new principle," which would be applied in other reorganization cases. Yet, in both of these cases, where the agency

[129] DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 168 (1927).

[130] Trust of Bingham v. Commissioner, 325 U.S. 365 at 370, 65 S.Ct. 1232 (1945). For approvals by writers of the Dickinson test, see Stern, "Review of Findings of Administrators, Judges, and Juries: A Comparative Analysis," 58 HARV. L. REV. 70 at 105 (1944); Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 HARV. L. REV. 753 at 830 (1944); Brown, "Fact and Law in Judicial Review," 56 HARV. L. REV. 899 at 904 (1943).

[131] In all fairness to Dickinson, it must, of course, be conceded that he never intended it to furnish such explanation, as his book was written long before the doctrine of limited review in the type of case we are concerned with had crystallized in Gray v. Powell.

[132] 316 U.S. 74, 62 S.Ct. 932 (1942).

[133] SEC v. Chenery Corp., 332 U.S. 194, 67 S.Ct. 1575 (1947).

[134] DAVIS, ADMINISTRATIVE LAW 904 (1951).

findings established general propositions, the Court applied the *Gray v. Powell* doctrine. Conversely, in a number of the cases to be discussed in this portion of this paper, where the Court appeared not to follow *Gray v. Powell,* the agency finding seemed to involve only the application of the statutory term to the unique facts of the case, and did not expressly establish any general proposition applicable beyond the particular case.[135]

In addition, it must be admitted that the present writer is not clear in his own mind just what the Dickinson test means. The difficulty arises from the fact that every agency finding involving the application of a statutory term to the facts of a particular case establishes "a general proposition applicable . . . to all similar cases." "A precedent can always be used as an analogy for future cases, even when the facts seem to be unique."[136] Taken literally, then, the Dickinson test appears to be based upon a distinction which normally does not exist in practice. The agency finding may be based only upon the particular facts; even so, it may well serve as the basis for decision in other similar cases. As Justice Frankfurter expressed it, in a Tax Court case when the *Dobson* rule was still in effect,[137] "It is possible to transform every so-called question of fact concerning the propriety of expenses incurred by trustees into a generalized inquiry as to what the duties of a trustee are and, therefore, whether a particular activity satisfied the conception of management which trusteeship devolves upon a trustee. Such a way of dealing with these problems inevitably leads to casuistries which are to be avoided by a fair distribution of function between the Tax Court and the reviewing courts."[138] He went on to reject the Dickinson test as the basis for applying the *Dobson* rule. "But even assuming that the 'issues are broader than the particular facts presented' by this case, the Tax Court's decision is not deprived of finality. Yet an assumption to the contrary is at the core of the Government's argument. Simply because the correctness of 'certain general propositions' is involved does not make the position taken by the Tax Court a question of law."[139]

135 See, e.g., Thompson v. Lawson, 347 U.S. 334, 74 S.Ct. 555 (1954); Thompson v. United States, 343 U.S. 549, 72 S.Ct. 978 (1952); Pillsbury v. United Engineering Co., 342 U.S. 197, 72 S. Ct. 233 (1952); Norton v. Warner Co., 321 U.S. 565, 64 S.Ct. 747 (1944); Davies Warehouse Co. v. Bowles, 321 U.S. 144, 64 S.Ct. 474 (1944).

136 DAVIS, ADMINISTRATIVE LAW 904 (1951).

137 See note 92 supra.

138 Trust of Bingham v. Commissioner, 325 U.S. 365 at 383, 65 S.Ct. 1232 (1945).

139 Ibid.

In the case just referred to, Justice Frankfurter was not content merely to reject the Dickinson test of general propositions versus the application of legal concepts to unique facts.[140] He also informed us what, in his opinion, the true test was. "The real question is: What is the nature of the issue upon which the Tax Court has pronounced? If the issue presents a difficulty which it is peculiarly within the competence of the Tax Court to resolve and that court has given a fair answer, every consideration which led to the pronouncement in the *Dobson* case should preclude independent reexamination of the Tax Court's disposition."[141]

Justice Frankfurter's test appears to be basically similar to that urged by Professor Davis. According to Professor Davis, the governing criteria are the comparative qualification of agencies and courts. "The one element that stands out above all others is the comparative qualification of the agency and of the court to decide the particular question. Variation in intensiveness of review in accordance with comparative qualifications is so natural as to be almost inevitable whatever the theoretical formula."[142]

At first glance, the test of comparative qualifications seems an attractive one. The basic theory of review of administrative action in the Anglo-American world has, indeed, as has been mentioned,[143] been grounded upon that test, for the law-fact distinction rests upon a division of labor between judge and administrator, with each being given authority to decide the questions deemed to be within his competence. But, although the test of comparative qualifications may thus be the ultimate basis of our law of judicial review, one wonders whether it alone furnishes a workable criterion for the application of the *Gray v. Powell* doctrine.

Using the comparative qualifications test in the cases where the *Gray v. Powell* doctrine is relevant does not, it is felt, satisfactorily explain many of the decisions. It is true that, in a case like *Dobson v. Commissioner*,[144] where the Court said that the challenged finding turned upon a question of proper tax accounting, it could validly be said that such a question was peculiarly

140 The test is so phrased in DAVIS, ADMINISTRATIVE LAW 902 (1951).
141 325 U.S. 365 at 384, 65 S.Ct. 1232 (1945).
142 DAVIS, ADMINISTRATIVE LAW 893 (1951).
143 P. 10 supra.
144 320 U.S. 489, 64 S.Ct. 239 (1943).

within the special competence of the Tax Court.[145] The same is true in some of the other cases discussed in this paper.[146] Many of the decisions cannot, however, be explained by the comparative qualifications test. Most of the cases, as Professor Davis concedes, "involve questions on which the reviewing judges may easily educate themselves. Judges as well as administrators are competent to handle problems about unfair labor practices, unfair trade practices, discriminatory activities of public utilities, deception in the marketing of securities, unreasonableness of rates, the public interest with respect to broadcasting, application of the tax laws, and the like."[147] And, despite the author's conclusions to the contrary,[148] it would seem, to the present writer at least, that the test of comparative qualifications is not workable in cases involving these subjects.

That this is true can be seen from a comparison of some of the cases. In the already discussed *Gregg Cartage Co.* case,[149] the Court applied the *Gray v. Powell* doctrine to limit review of a finding that an interruption of a motor carrier's service because of bankruptcy was not one over which the carrier had no "control." Yet it would seem that the question of whether the bankruptcy was within the carrier's control (especially since the agency was relying on a general rule that every bankruptcy arose from causes within the bankrupt's control within the meaning of the Motor Carrier Act) is one on which the courts are at least as competent as the agency.

In the *Hearst* case,[150] as we saw, the Court applied *Gray v. Powell* to review of an agency finding that certain newsboys were "employees" within the meaning of the National Labor Relations Act. On the other hand, in a case to be discussed, the Court appears to have reviewed fully an administrative finding that a company was an "employer" under the relevant section of the Railroad Retirement Act.[151] Why was the agency the better quali-

145 The language used by Frankfurter, J., in Trust of Bingham v. Commissioner, 325 U.S. 365 at 380, 65 S.Ct. 1232 (1945).

146 This is particularly true of Interstate Commerce Commission findings, such as those involved in cases like Thompson v. United States, 343 U.S. 549, 72 S.Ct. 978 (1952); United States v. Rosenblum Truck Lines, 315 U.S. 50, 62 S.Ct. 445 (1942); Alton R. Co. v. United States, 315 U.S. 15, 62 S.Ct. 432 (1942).

147 DAVIS, ADMINISTRATIVE LAW 894 (1951).

148 Ibid.

149 Supra note 100.

150 Supra note 78.

151 Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446, 66 S.Ct. 238 (1946).

fied to find the existence of the employment relationship in the first case and the Court the better qualified in the second? The answer is, of course, that the test of comparative qualifications does not explain the difference in the Court's approach in the two cases.[152]

Even if the comparative qualifications idea were to work more satisfactorily, it would still have to be rejected. The whole point about judicial review is that, through it, the decisions of the administrative expert are subjected to the impartial scrutiny of the non-expert judge. In the Anglo-American system, the courts are presumed to be competent in matters involving statutory construction, regardless of whether the administrator may, in fact, be more qualified in the particular case. Only if such matters are decided judicially, it is felt, can it be made certain that the agencies do not pass the bounds of their statutory powers.

What has been said above indicates that the tests suggested by some commentators are not adequate to explain the cases which do not follow the doctrine of *Gray v. Powell.* Must we then conclude that the application of that doctrine in particular cases depends upon the individual caprices of the judges who make up the reviewing court? That there is a certain amount of judicial discretion involved in the application of the *Gray v. Powell* doctrine cannot be denied. At the same time, there are certain criteria which appear to have influenced the highest Court in deciding not to apply the doctrine in specific cases. What these are can best be gathered from an analysis of those cases themselves. Such analysis will seek to determine why, in each of these cases, the Court did not choose to follow the *Gray v. Powell* doctrine. Most of the Court's refusals can, it will be seen, be explained on rational grounds, not inconsistent with the doctrine. This is true even though the Court itself did not, in many of these cases, expressly state the reasons to be urged by the present writer.

Adversary procedure in contested cases. If the doctrine of *Gray v. Powell* is a sound one, it rests upon the same theory as does limited review of administrative findings of fact. The agency, which has made such findings, is presumably more expert than the reviewing court in the field administered by it, if only be-

[152] See also Thompson v. Lawson, 347 U.S. 334, 74 S.Ct. 555 (1954); Thompson v. United States, 343 U.S. 549, 72 S.Ct. 978 (1952); Board of Governors v. Agnew, 329 U.S. 441, 67 S.Ct. 411 (1947); Norton v. Warner Co., 321 U.S. 565, 64 S.Ct. 747 (1944), where the test of comparative qualifications cannot explain why the Court granted full review.

cause of its constant preoccupation with cases in that field. In addition, there is the need for preserving the integrity of the administrative process. It may be extreme to say, as did a Wisconsin judge, that "If courts are to weigh the evidence before commissions . . ., the efficiency of administrative action will be greatly impaired. If it must give a trial de novo, the twilight of administrative law is at hand, for the proceedings before the administrative body will be but a perfunctory skirmish, the principal contribution of which will be delay."[153] But there are few administrative lawyers in this country who would deny that for the courts on review to, in effect, repeat the entire decision process of the agencies would be to turn their proceedings into mere preliminaries to the real contests which would occur in the courts. This would frustrate the legislative purpose in vesting powers of decisions in agencies, rather than courts, in the first instance. Instead of withdrawing from litigation the great bulk of cases coming within administrative competence, it would make possible a procedure whereby such cases must be fully litigated twice before they could be finally resolved.[154]

Gray v. Powell applies these considerations, which, from almost the beginning of our administrative law, were seen to militate against wide review of facts, to agency applications of law to fact, even though they may involve the construction by the agency of its enabling legislation. Both the rule of limited review of fact findings and the doctrine of *Gray v. Powell* are, however, based upon the fact that the findings at issue have been fully considered by the agency in an actual contested case. They have been arrived at after a formal adversary procedure in which all interested parties have been able fully to present their side of the case, both through evidence and argument and through the right to attack their opponent's case, by cross-examination and rebuttal evidence. The findings challenged on review, in cases governed both by the substantial-evidence rule and *Gray v. Powell,* have been made by the agency concerned after it has considered the case presented by both sides, as it has been developed at the hearing, and, indeed under the fundamental principle of "exclusiveness of the record," only materials in the record of the hearing can be considered by the

153 General Accident F. & L. Assur. Corp. v. Industrial Commission, 223 Wis. 635 at 646, 271 N.W. 385 (1937).

154 Compare Brandeis, J., dissenting, in Crowell v. Benson, 285 U.S. 22 at 74, 52 S.Ct. 285 (1932).

agency in its decision process.[155] That the agency has made its findings after a formal adversary proceeding, in which all those affected could fully present their case, and after full consideration of the record, is bound to be of great influence in inducing the reviewing court to defer to those findings, even though they may involve questions of statutory interpretation.

The same considerations do not apply where *Gray v. Powell* type findings have not been made in an actual contested case. Even though *Gray v. Powell* may require judicial deference to agency interpretations made in decisions rendered *inter partes,* it does not necessarily follow that the same deference must be paid to other administrative interpretations. On the contrary, interpretations by agencies of statutes enforced by them which are not made in adversary proceedings after full hearing should not come within the *Gray v. Powell* doctrine. There is, as Judge Learned Hand has pointed out, "indeed a basis for making such a distinction because the position of a public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, his duty is to present the case for the side which he represents, and leave decision to the court, or the administrative tribunal, upon which lies the responsibility of decision. If he surrenders a plausible construction, it will, at least it may, be surrendered forever; and yet it may be right. Since such rulings need not have the detachment of a judicial, or semi-judicial decision, and may properly carry a bias, it would seem that they should not be as authoritative. . . ."[156]

The Supreme Court itself appears to have made the distinction referred to by Judge Hand the basis for its decision in *Fishgold v. Sullivan Drydock and Repair Corp.*[157] That case involved the construction of that portion of the Selective Service Act[158] which provided that one who has been inducted into military service is entitled, upon returning to civilian life, to be reemployed in his old position or in "a position of like seniority, status, and pay." A former employee who has thus been reemployed "shall not be discharged from such position without cause within one year after such restoration." Plaintiff, a veteran, was reemployed. When

155 See §7 (d) of the Federal Administrative Procedure Act of 1946, 60 Stat. L. 237, 5 U.S.C. (1952) §1001.

156 Fishgold v. Sullivan Drydock and Repair Corp., (2d Cir. 1946) 154 F. (2d) 785 at 789-790.

157 328 U.S. 275, 66 S.Ct. 1105 (1946).

158 54 Stat. L. 885, §8 (1940), now 50 U.S.C. App. (1952) §459 (b) (A) (1).

subsequent layoffs occurred because of slack work, he was laid off for various brief periods of time, while other employees, non-veterans, were retained. The non-veterans were senior employees; that is, their length of service with the employer was greater than plaintiff's even though his time in military service had been counted as service in the plant. The collective bargaining agreement then in force provided that "decreases in the working force shall be based on length of service" and the employer acted under this contract in retaining older employees when plaintiff was laid off. Plaintiff sought a declaratory judgment that, under the statute, he could not be laid off within a year after his restoration, so long as work was available for any employee. He relied on a memorandum issued by the Director of Selective Service pursuant to his authority to establish a "Personnel Division" to render aid to veterans "in the replacement in their former positions." The Director's memorandum stated that the act required reinstatement of a veteran to "his former position or one of like seniority, status and pay even though such reinstatement necessitates the discharge of a non-veteran with greater seniority." The Supreme Court, agreeing with the decision of Judge Hand already quoted from, rejected the administrative interpretation relied upon by plaintiff. "The ruling of the Director," said Justice Douglas, "may be resorted to for guidance. . . . But his rulings are not made in adversary proceedings and are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making *inter partes* decisions."[159]

Several of the cases where the Supreme Court has not followed the doctrine of *Gray v. Powell* can be explained by the absence in them of an actual contested case before the agency. The most recent of them is *Federal Communications Commission v. American Broadcasting Co.*,[160] which may, at first glance, appear to involve another capricious refusal of the highest Court to apply the *Gray v. Powell* doctrine. At issue was the validity of an FCC order adopting certain interpretative rules in relation to radio and television "give-away" programs. The Court, in a unanimous decision, held that "give-away" programs were not within the criminal statute[161] prohibiting the broadcasting of any lottery

[159] 328 U.S. 275 at 290, 66 S.Ct. 1105 (1946). This does not mean that the reviewing court will not give weight to such agency interpretations. See Skidmore v. Swift and Co., 323 U.S. 134 at 140, 65 S.Ct. 161 (1944).

[160] 347 U.S. 284, 74 S.Ct. 593 (1954).

[161] 18 U.S.C. (1952) §1304.

gift enterprise, or similar scheme offering prizes dependent upon lot or chance and that the commission rules attempting to prohibit such programs by licensing were invalid. The FCC's authority to enforce the criminal prohibition, by the exercise of its licensing power, is limited by the scope of the statute. Since the programs in question are not illegal under the statute, the commission cannot employ the statute to make them so by agency action.

At issue in the instant case was the application of the statutory term "lottery, gift enterprise, or similar scheme" to the undisputed facts. Under *Gray v. Powell,* the administrative application must be upheld if it is reasonable. At the same time, there is no doubt that the Court in this case was reviewing not the *reasonableness,* but the *rightness,* of the FCC action. Why was not the *Gray v. Powell* doctrine applied to limit the scope of review here?

The answer is, at least in part, based upon the distinction drawn above between agency interpretations made in contested cases after full hearing and those made in other ways. The FCC application of the statutory term "lottery, gift enterprise, or similar scheme" to "give-away" programs was not made in an actual case decided by the agency. It was contained, instead, in an order of the commission adopting certain interpretative rules in relation to such programs. Like the rules at issue in the celebrated *Columbia Broadcasting System* case,[162] whether these rules would actually be applied in a specific case depended upon the contingency of future administrative action. Nor did it make any difference, in the instant case, that the proposed rules had actually been considered at a hearing of the full commission. This did not change the nature of the proceeding from rule-making to adversary adjudication. "It was not necessary for the Commission to take testimony before adopting the Rules. . . . The Commission was not adjudicating any controversy which would require a hearing and the application of trial procedure. That might come later, in a specific case, when an application for a renewal license would be under consideration."[163]

The fact that general rule-making was involved in the *American Broadcasting Co.* case would appear to explain why the Court there did not limit review by the *Gray v. Powell* doctrine, for it

162 316 U.S. 407, 62 S.Ct. 1194 (1942).

163 American Broadcasting Co. v. United States, (D.C. N.Y. 1953) 110 F. Supp. 374 at 383.

applies only to agency resolutions of specific contested cases. Yet, even though the agency action may dispose of an actual case, the considerations which make for the application of *Gray v. Powell* may not be present. That case requires judicial deference to the type of finding involved in it because the agency, vested with competence by the legislature in the particular case, has made the finding after full consideration of all of the evidence presented at a formal adversary hearing. If the agency decision, though it resolves a contested case, is one which has not been preceded by a full hearing, the doctrine of *Gray v. Powell* need not be applied.

What has just been said helps to explain a Supreme Court decision, which has given difficulty to commentators seeking to explain the *Gray v. Powell* doctrine. In the case referred to — *Davies Warehouse Co. v. Bowles*[164]—petitioner conducted a public warehouse in Los Angeles. As a public utility under the applicable California laws, it was subject to regulation by the relevant California agency. The Federal Price Administrator, acting under the Emergency Price Control Act of 1942,[165] issued maximum price regulations whose effect would have been to prohibit petitioner from charging an increased rate authorized by the California regulatory agency. The Price Control Act provided that "nothing in this Act shall be construed to authorize the regulation of . . . (2) rates charged by any common carrier or other public utility." Petitioner, asserting itself to be within this exemption, made timely protest to the price administrator, which was denied. It then filed a complaint with the Emergency Court of Appeals, asking it to set aside the maximum price regulations in so far as they purported to regulate its charges. The Emergency Court of Appeals dismissed the complaint.[166] The Supreme Court reversed, holding that petitioner was a "public utility" within the exemption clause of the federal law.

There is little doubt but that the Court in the *Davies* case substituted its judgment for that of the agency in the manner which the *Gray v. Powell* doctrine sought to preclude. Indeed, Justice Jackson expressly rejected as inapplicable in the case the doctrine that "we should accept the Administrator's view in deference to administrative construction."[167] It is not, however, necessary to

164 321 U.S. 144, 64 S.Ct. 474 (1944).
165 56 Stat. L. 23, c. 26, §302(c) (1942).
166 Davies Warehouse Co. v. Brown, (Em. Ct. App. 1943) 137 F. (2d) 201.
167 321 U.S. 144 at 156, 64 S.Ct. 474 (1944).

conclude from this that the *Davies* case is inconsistent with *Gray v. Powell.*[168] Although the two cases were substantially similar[169] there was at least one basic difference. In *Gray v. Powell,* the challenged finding had been made after a formal adversary hearing before the agency. In *Davies,* this essential element was lacking. The price administrator had, it is true, decided petitioner's specific case. But he had not done so after a full and fair hearing. Although the protest procedure of the Office of Price Administration did afford affected individuals some opportunity to present their views, it clearly did not provide for a full, judicial-type adversary hearing "in accordance with the cherished judicial tradition embodying the basic concepts of fair play."[170] And, in such a case, as already pointed out, there is reason for not vesting the agency interpretive finding with the *Gray v. Powell* degree of finality.[171]

Conflicting interpretations. The doctrine of *Gray v. Powell* applies the rule of limited review to administrative interpretations of statutory terms, provided, as we have just seen, that such interpretations are made in actual contested cases after full hearings. In such cases, it is felt by our courts, they must defer to the agencies charged with the job of continuous administration in the areas assigned to them by the legislature. *Gray v. Powell* rests essentially upon the *expertise* of administrative agencies, which is said to render them peculiarly competent in their specialized fields, even when it comes to giving specific content to the terms of legislation covering those fields. To paraphrase Justice Frankfurter, the specialized equipment of the agencies and the trained instinct that comes from their experience ought to leave with them the final say as to matters which involve construction and application of legislation.[172]

168 DAVIS, ADMINISTRATIVE LAW 887-888 (1951), so concludes.

169 Id. at 887.

170 Morgan v. United States, 304 U.S. 1 at 22, 58 S.Ct. 773 (1938). That the procedure under the Emergency Price Control Act provided for less than a full adversary hearing is well shown by Roberts, J., dissenting, in Yakus v. United States, 321 U.S. 414 at 453-454, 64 S.Ct. 660 (1944).

171 Other cases where full review was granted because of the lack of formal adversary hearings are Bartels v. Birmingham, 332 U.S. 126, 67 S.Ct. 1547 (1947); United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463 (1947). Compare Frankfurter, J., dissenting, in SEC v. Howey Co., 328 U.S. 293 at 301, 66 S.Ct. 1100 (1946) (rule of limited review not applicable where action brought by agency for injunction).

172 Trust of Bingham v. Commissioner, 325 U.S. 365 at 380-381, 65 S.Ct. 1232 (1945).

It would seem, however, that for judicial deference to be required on review of the *Gray v. Powell* type of finding, the challenged administrative interpretation should be consistent with that rendered in other cases by the agency. If, on the contrary, the agency construction at issue is inconsistent with that taken on other occasions, there is much less reason for the *Gray v. Powell* doctrine to apply. Where the administrative expert himself is so unsure of his ground that he has taken different positions in different cases, the courts may be forgiven if, on review, they feel something less than the confidence in agency *expertise* that called forth the rule of limited review in *Gray v. Powell* itself. In such a case, the reviewing court may well declare that the agency decisions themselves hardly have the consistency to which it should yield its judgment.[173] This view was well expressed by Justice Rutledge in a case where the agency[174] had rendered inconsistent decisions applying the relevant statutory term in two cases before it. "One might," he conceded, "entertain the view that in a close situation the [agency's] judgment should be accepted whatever way the die were cast, although reviewing courts might differ on the direction. But it would not follow, and in my judgment should not, that they are powerless when the throw is in opposite directions at the same time. When this occurs, in my opinion a 'clear-cut' question of law is presented, rising above the rubric of 'expert administrative determination.' The more apt characterization would be 'expert administrative fog.' "[175]

A number of Supreme Court decisions which appear inconsistent with the doctrine of *Gray v. Powell* can be explained by the fact that there were conflicting administrative interpretations present in those cases. An illustrative case is *Barrett Line v. United States*,[176] which arose out of the Interstate Commerce Commission's refusal to grant an application for "grandfather" rights to engage in the business of a contract carrier by water, under a statutory provision basically similar to that applicable to motor carriers which has already been considered.[177] Review of ICC

[173] Hand, J., in Fishgold v. Sullivan Drydock and Repair Corp., (2d Cir. 1946) 154 F. (2d) 785 at 789.

[174] The case involved review of the Tax Court which was, at that time, under the rule of Dobson v. Commissioner, supra note 82, treated like an administrative agency so far as the scope of review of its decisions was concerned.

[175] John Kelley Co. v. Commissioner, 326 U.S. 521 at 533, 66 S.Ct. 299 (1946).

[176] 326 U.S. 179, 65 S.Ct. 1504 (1945).

[177] Supra note 94.

decisions under the "grandfather clause" of the Motor Carrier Act is, we have seen, governed by the doctrine of *Gray v. Powell.* Despite this, the Court, in the *Barrett Line* case, held that the commission had erred in concluding that the applicant was not engaged in chartering operations subject to the act on the critical date. The Court seems to have reviewed the rightness, rather than merely the reasonableness, of the commission's decision that the applicant was not a bona fide carrier engaged in chartering operations. And this led four dissenting justices, citing *Gray v. Powell,* to assert, "We think that the interpretation . . . made by the Commission was proper. Certainly, the construction of this provision involves considerations so bound up with the technical subject matter that, even though the neutral language of the statute permits, as a matter of English, the construction which the Court now makes, the experience of the Commission should prevail."[178]

The apparent arbitrary refusal of the majority of the Court to follow *Gray v. Powell* is explained by the fact that the ICC itself had, in a number of other cases involving similar facts, reached a different result, holding in them that the applicants were engaged in bona fide operation as carriers within the meaning of the act. What the Court terms this agency "inconsistency in the statute's application"[179] was, without a doubt, the factor that induced the Court to decline to follow the *Gray v. Powell* approach. This is recognized by the dissenting justices, who state that, "The Court, in rejecting the refusal of the Interstate Commerce Commission to grant a permit as a contract carrier by water for charter purposes, is greatly influenced by an alleged conflict in the Commission's determinations."[180] The dissenters go on to declare that the inconsistencies in agency interpretation should make no difference. "Assuming such a conflict, it is our business to deal with the case now here and not to be concerned with apparent inconsistencies in administrative determinations."[181] It has already been shown, however, that the presence of conflicting interpretations is of great importance in determining whether the *Gray v. Powell* doctrine should be followed. Where the administrative

178 326 U.S. 179 at 202, 65 S.Ct. 1504 (1945).
179 Id. at 197.
180 Id. at 201.
181 Id. at 201-202.
182 Compare United States v. American Union Transport, 327 U.S. 437 at 454, 66 S.Ct. 644 (1946) (agency failure to exercise jurisdiction held not like conflicting interpretations so as to make Gray v. Powell inapplicable).

expert himself is not certain that the interpretation urged by him in the particular case is sound, there is no real reason why the reviewing court should defer to his judgment.[182]

In the *Barrett Line* case just discussed, the conflicting applications of the statute were made by the same agency. What happens if the inconsistent interpretations are made by different agencies? In such a case, too, it is believed the doctrine of *Gray v. Powell* should not apply. If the interpretation of the administrative expert whose act is being reviewed is contradicted by that of other administrators, the reviewing court should decide the question for itself, rather than show the *Gray v. Powell* type of deference to any of the conflicting experts. For, if this is not done, to which of the experts should the court defer? To the agency whose act is being reviewed, simply because it happens to be involved in the particular case? If that is the rule, what is the court to do if, at a later date, the inconsistent interpretation of the other agency is challenged before it? Such interpretation will also have to be upheld if it is reasonable and that may well mean the giving of judicial sanction to two diametrically opposed agency interpretations.

That this is not a mere theoretical possibility is shown by *Barnard v. Carey*,[183] a case whose facts were so extreme as almost to defy belief, except that they were so reported by the district court. The plaintiffs in the *Barnard* case were the manufacturer of and a dealer in "Soya Butter," a product made exclusively from soya beans and other vegetable products. Under the relevant section of the Internal Revenue Code,[184] the Collector of Internal Revenue could order oleomargarine manufactured for sale to be labeled and taxed as such. His orders with respect to labeling could be enforced by distraint proceedings as well as by criminal penalties. At the same time, under the Food, Drug, and Cosmetic Act,[185] the Food and Drug Administration was given authority to see that food products were labeled properly. And improper labeling under that law, too, could be punished by distraint and criminal penalties.

In the district court, plaintiffs offered in evidence a photostatic copy of a letter dated November 13, 1942, addressed to the plaintiff Butler Food Products, attention H. O. Butler, and signed by

183 (D.C. Ohio 1945) 60 F. Supp. 539.
184 I.R.C. §2300 et seq., now I.R.C. (1954), §§4591-4597.
185 52 Stat. L. 1040 (1938), as amended, 21 U.S.C. (1952) §§301-392.

D. S. Bliss, Deputy Commissioner, stating that according to the analysis of the Treasury Department the product was found to be oleomargarine and that it would be necessary therefore for the manufacturer to label his product as such. Plaintiffs also offered in evidence a photostatic copy of a letter dated October 31, 1942, addressed to H. O. Butler, Director Butler Food Products, and signed by C. W. Crawford, Assistant Commissioner of Food and Drugs, stating: "It is our understanding that you are familiar with the standard for oleomargarine promulgated under the terms of the Federal Food, Drug and Cosmetic Act. The product you describe is not in conformity with that standard and can not be sold as oleomargarine within the jurisdiction of that Act."

The plaintiffs were thus subject to diametrically opposed orders by two federal agencies, each of which had jurisdiction under the relevant laws. The Bureau of Internal Revenue had ordered them to label their product as oleomargarine. The Food and Drug Administration had ordered them not to label their product as oleomargarine. And, if either order was disobeyed, the plaintiffs were subject to the penalties prescribed in the act. In order to extricate themselves from their predicament, plaintiffs brought an action against the Collector of Internal Revenue for a declaration that their product was not oleomargarine and should not be taxed as such.

For the reviewing court to apply the *Gray v. Powell* doctrine to limit its review of the order challenged before it in a case like this, in the face of the conflicting interpretation of the Food and Drug Administration, would be, to put it mildly, unjust to plaintiffs. Under *Gray v. Powell,* the Treasury's application of the statutory term "oleomargarine" to the facts of the case would have to be upheld, unless it was unreasonable. But the same would also be true of the ruling of the Food and Drug Administration in a later action testing its validity. As the opinion of the court in the *Barnard* case put it, "When the court inquired whether all the arguments advanced for the Collector could not also be advanced in support of the order of the Commissioner of Foods and Drugs, it was admitted that they could be. The court therefore found itself in the position where, if it adopted those theories, it would today be obligated to sustain the order of the Collector distraining the plaintiff's product because not labeled 'oleomargarine', and then tomorrow might be obligated to sustain the order of the Com-

missioner of Food and Drugs distraining the product because it was labeled 'oleomargarine.' "[186]

In a case like *Barnard v. Carey,* the *Gray v. Powell* doctrine would lead to ridiculous results. Under it, the action of both agencies would have to be upheld, for each, if it stood alone, involved a reasonable interpretation of the law. But, said Judge Wilkin, in granting a motion for a temporary injunction against the enforcement of the Treasury order, a court exercising general equitable jurisdiction *must* be able to give plaintiffs some remedy. The implication is that where the agencies themselves conflict in their interpretations, there is no room for the doctrine of limited review. And, while this may be contrary to *Gray v. Powell,* it is certainly in accord with common sense.

Barnard v. Carey is the extreme case. Yet it shows that the rule of limited review is wholly out of place in cases where challenged administrative applications of statutes are inconsistent with those made by other agencies. In such cases, there is no reason why the reviewing court should defer to the *expertise* of any one agency. It should consequently decline to follow *Gray v. Powell.*

Fishgold v. Sullivan Drydock and Repair Corp.,[187] which has been discussed in another connection, appears to bear out this view. We have already seen that the Court there refused to follow *Gray v. Powell* because the agency interpretation had not been made in a contested adversary proceeding. Also of weight, however, in inducing the Court to decide as it did was the fact that the interpretation of the Director of Selective Service, upon which plaintiff had relied, was inconsistent with the construction given to the relevant statutory term by the National War Labor Board. This inconsistency in the agency interpretations was emphasized both by Judge Learned Hand in the lower court[188] and in the opinion of Justice Jackson.[189]

Another case where the inconsistency of administrative interpretations was of influence in leading the Court not to apply the doctrine of limited review is *Social Security Board v. Nierotko*[190]— a decision which, almost more than any other, has defied analysis

186 60 F. Supp. 539 at 540-541.
187 Supra note 157.
188 154 F. (2d) 785 at 789.
189 328 U.S. 275 at 290, 66 S.Ct. 1105 (1946).
190 327 U.S. 358, 66 S.Ct. 637 (1946).

in terms of the *Gray v. Powell* doctrine. In the *Nierotko* case, respondent was found by the National Labor Relations Board to have been wrongfully discharged for union activity by his employer and was reinstated by that Board in his employment with directions for "back pay" for the period of his discharge. The "back pay" was paid by the employer. Thereafter respondent requested the Social Security Board to credit him in the sum of the "back pay" on his Old Age and Survivor's Insurance account with the Board. The Board refused to credit the "back pay" as wages. The Court set aside the Board's decision, holding that the "back pay" was wages within the meaning of the relevant statute.

In its *Nierotko* decision, the Court was plainly substituting its judgment for that of the Social Security Board. ". . . We think it plain," said Justice Reed, "that an individual . . . who receives 'back pay' for a period of time during which he was wrongfully separated from his job, is entitled to have that award of back pay treated as wages. . . ."[191] The administrative decision to the contrary, declared the opinion, is "unsound."[192]

The seeming inconsistency between the Court's approach in *Nierotko* and *Gray v. Powell* is, if anything, increased, rather than diminished, by Justice Reed's attempt to distinguish the *Gray v. Powell* line of cases. To the argument that *National Labor Relations Board v. Hearst Publications*[193] and *Gray v. Powell* required the Court to uphold the agency interpretation, Justice Reed stated, "Administrative determinations must have a basis in law and must be within the granted authority."[194] Yet, as Professor Davis aptly points out, "The same remark, of course, would be equally applicable to both *Gray v. Powell* and the *Hearst* case, but the validity of the remark did not prevent the Court in those cases from limiting its inquiry to 'rational basis' of the administrative interpretation."[195] Justice Reed went on to say that the Board's interpretation went beyond the statutory limits, declaring in an already-cited passage, "An agency may not finally decide the limits of its statutory power. That is a judicial function."[196] But the same could be said of most cases which follow the *Gray v. Powell* doctrine. As has already been emphasized, the agency's

191 Id. at 364.
192 Id. at 367.
193 Supra note 78.
194 327 U.S. 358 at 369 (1946).
195 DAVIS, ADMINISTRATIVE LAW 909-910 (1951).
196 327 U.S. 358 at 369, 66 S.Ct. 637 (1946).

statutory jurisdiction will normally depend upon its proper application of the terms contained in its enabling legislation. And, under *Gray v. Powell,* the agency itself may consequently be vested with the authority all but finally to decide the limits of its statutory power.

Despite the weakness of the Court's attempt to explain its *Nierotko* decision, it should be pointed out that there was present in that case a factor which might well lead to the judicial refusal to apply the *Gray v. Powell* doctrine, namely, that of conflicting agency interpretations. The Social Security Board, in holding that "back pay" was not wages, had relied upon the definition in the Social Security Act of wages as "remuneration for employment" and employment as "any service . . . performed . . . by an employee for his employer. . . ."[197] The Board urged that respondent did not perform any service for the "back pay" received by him. The Court, however, referred to the fact that both the Social Security Board itself and other agencies had treated payments made by employers, for which no specific services had been performed, as wages. Thus, a regulation of the Social Security Board had characterized vacation allowances as wages, and the Bureau of Internal Revenue had classified dismissal pay, vacation allowances, and sick pay, as well as amounts paid employees during absence on jury service, as wages.[198] These interpretations, which are inconsistent with that made by the Board in the *Nierotko* case,[199] would seem to be reason enough for the Court not to limit its review by the *Gray v. Powell* doctrine. Unless the administrative experts themselves are consistent in their interpretations, reviewing courts need not, even under *Gray v. Powell,* defer to them.[200]

A variation of the problem of conflicting interpretations on the part of different agencies has been presented since 1947 in cases involving the National Labor Relations Board. Under the Taft-Hartley Act of that year,[201] the Board was, in effect, split into

197 49 Stat. L. 625 (1935), as amended, 42 U.S.C. (1952) §§409, 410.

198 327 U.S. 358 at 366 (1946).

199 It should also be pointed out that the National Labor Relations Board, in NLRB v. Killoren, (8th Cir. 1941) 122 F. (2d) 609, had argued tha "back pay" constituted wages in a bankruptcy case. This was of influence in inducing the court of appeals to decide as it did in Nierotko. (6th Cir. 1945) 149 F. (2d) 273 at 277.

200 The Court in Nierotko was also aided by the fact that both the Social Security Board and the Department of Justice indicated that they were not sure that the Board's interpretation was sound, even if the statute compelled it. See DAVIS, ADMINISTRATIVE LAW 910, n. 178 (1951).

201 61 Stat. L. 139 (1947), 29 U.S.C. (1952) §153.

two more or less separate agencies, with powers of investigation and prosecution being vested in the independent Office of the General Counsel, while the Board itself was left only with powers of hearing and decision. Are the General Counsel and the Board to be treated today like two separate agencies, if their interpretations of the statute conflict, for purposes of applying the doctrine of *Gray v. Powell*? The answer to this question should depend upon the actual extent of the separation between the Counsel and the Board. If they are, in fact, really two distinct agencies—each with its separate functions to perform and not subject to each other's control—then there would seem to be no real reason why they should not be so treated, insofar as the *Gray v. Powell* doctrine is concerned.

As the Taft-Hartley provisions have worked out, it seems not unfair to conclude that there has been, in practical effect, a division of the Labor Board into two separate agencies. It is true that, in form, the separation has not been as complete as it would have been had the Board's investigating and prosecuting functions been transferred to the Department of Justice.[202] In substance, however, the General Counsel has been given authority independent of the Board, and the post-1947 conflicts between the Board and the Counsel show how real the latter's independence has actually been.

Since the NLRB and the General Counsel are, in fact, if not in form, separate agencies, there is good reason for treating them as such for the purposes of applying *Gray v. Powell*. Since both the Counsel and the Board are now the administrative experts in the field of labor relations, their constructions of the relevant statute should not conflict, if there is to be the consistency in administrative interpretations required for the doctrine of limited review to apply. If, on the contrary, their interpretations are inconsistent, the considerations discussed in connection with cases like *Social Security Board v. Nierotko*[203] should govern.

A Supreme Court decision involving a post-Taft-Hartley review of the NLRB which is explainable, if at all, only upon the above basis is *National Labor Relations Board v. Highland Park Manufacturing Co.*[204] In that case, the Board had entertained a complaint by the Textile Workers Union of America against

202 See DAVIS, ADMINISTRATIVE LAW 399 (1951).
203 Supra note 190.
204 341 U.S. 322, 71 S.Ct. 758 (1951).

respondent and ordered respondent to bargain with that union. At all times relevant to the proceedings, the Textile Workers Union was affiliated with the Congress of Industrial Organizations and, while the Textile Workers Union officers had filed the non-Communist affidavits required by the Taft-Hartley Act, the officers of the CIO at that time had not. The statute provides that "No investigation shall be made by the Board. . . , no petition under section 9 (e) (1) of this section shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed . . . by each officer of such labor organization and the officers of any *national or international labor organization* of which it is an affiliate or constituent unit that he is not a member of the Communist Party. . . ."[205] The order was challenged upon the ground, among others, that the failure of the CIO officers to file non-Communist affidavits disabled its affiliate, the Textile Workers Union, and the Board could not entertain their complaint and enter the order.

The Supreme Court, affirming the decision of the court of appeals,[206] held that the NLRB could not, in these circumstances, entertain the complaint. The Board had based its action upon the view that the use of the adjectives "national" and "international" in the statutory provision excluded the CIO, because it is regarded in labor circles as a federation rather than a national or international union. And, said the Board, on review, its finding that the CIO did not come within the statutory term "national or international labor organization" was subject only to the limited review permitted by the doctrine of *Gray v. Powell.* The Court rejected this claim and decided, on its own independent judgment, that the CIO came within the statutory term.

It is clear from the dissenting opinion of Justice Frankfurter[207] that the Board's finding was at least a reasonable one. Why then did not the Court uphold the finding under *Gray v. Powell*? Justice Jackson's majority opinion gives two answers. In the first place, said he, "here there is no question of fact."[208] But it has been settled from the beginning that the *Gray v. Powell* doctrine applies to agency applications of statutory terms to undisputed

205 61 Stat. L. 146 (1947), 29 U.S.C. (1952) §159h (emphasis added).
206 (4th Cir. 1950) 184 F. (2d) 98.
207 341 U.S. 322 at 327, 71 S.Ct. 758 (1951).
208 Id. at 325.

facts.[209] And, even more important, said Justice Jackson, the question at issue is one of law upon which the very power of the agency depends. "An issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal."[210] Yet that, as we have seen, can also be said of most of the cases where the Court followed *Gray v. Powell.* As Justice Douglas expressed it in a separate dissent, "In situations no more difficult than this we have taken the administrative construction of statutory words. Until today the test has been not whether the construction would be our own if we sat as the Board, but whether it has a reasonable basis in custom, practice, or legislative history."[211]

Despite the fact that the reasons given by Justice Jackson do not really distinguish *Highland Park* from *Gray v. Powell,* it is the opinion of the present writer that the Court was correct in its refusal to follow the doctrine of limited review. And that is the case because there was, in actuality, a conflict in agency interpretations present in the *Highland Park* case. The General Counsel of the Board had ruled that the Board could not entertain a complaint under these circumstances; but the Board, with one member dissenting, overruled him. As has been pointed out, the NLRB and the General Counsel have, since the Taft-Hartley Act, been in substance two separate agencies. When they conflict in their interpretations, there is lacking the consistency in administrative *expertise* to which the courts should make the *Gray v. Powell* type of deference. And, if that is true, *Highland Park* can rightly be treated like cases such as the already-discussed *Fishgold*[212] and *Nierotko* cases.[213]

209 In Gray v. Powell itself, indeed, there was no dispute as to the facts. And see Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469 at 478, 67 S.Ct. 801 (1947), where the Court expressly stated that the basic facts were undisputed in this type of case.

210 341 U.S. 322 at 326, 71 S.Ct. 758 (1951).

211 Id. at 327-328.

212 Supra notes 157 and 187.

213 Supra note 190. Davies Warehouse Co. v. Bowles, supra note 164, presents another variation of the problem of conflicting agency interpretations. The holding of the Federal Price Administrator there that petitioner was not a "public utility" and hence not exempt from the federal price control law was contrary to the view taken by the relevant California regulatory agency which had consistently treated petitioner as a "public utility." The fact that the conflicting interpretation was by a state, rather than a federal, agency should make no difference so far as the applicability of Gray v. Powell is concerned, provided that the state agency has jurisdiction to make such interpretation.

Unreasonable findings. Some of the Supreme Court decisions refusing to uphold agency findings of the *Gray v. Powell* type are explainable on the simple ground that the findings upset were not only wrong but unreasonable. Such cases are not inconsistent with the *Gray v. Powell* doctrine, for, even under it, the reviewing court can reverse where the challenged finding is seen not to have a rational basis.

These cases are easy to deal with where the Court tells us expressly that the finding upset was unreasonable. Such a case is *United States v. Pacific Coast Wholesalers.*[214] It involved a provision of the Interstate Commerce Act exempting from regulation by the Interstate Commerce Commission "the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates. . . ."[215] In the instant case, the ICC had held not entitled to this exemption an association of wholesale automobile parts dealers organized and operated in good faith, on a nonprofit basis, for the purpose of effecting savings in freight charges for its members by securing the benefits of carload, truckload, or other volume rates. On the facts presented, the Supreme Court agreed with the district court[216] that the ICC action was "without rational basis." The Court considered as decisive that no shipments by the association were ever undertaken except at the behest and for the benefit of a member. Looking to the agency between member and association, the Court saw no reasonable ground for ruling that the association was on a profit basis, or that it was holding its service out to the general public.[217] That being the case, the commission order had to be set aside, even under *Gray v. Powell.*

More difficult to deal with are cases where the Court does not expressly avow that the challenged agency findings are without a rational basis. A recent case of this type is *Thompson v. United States,*[218] where the Court set aside an order of the Interstate Commerce Commission finding that a "through route" existed between two points and directing the appellant railroad to provide

214 338 U.S. 689, 70 S.Ct. 411 (1950).
215 56 Stat. L. 285 (1942), 49 U.S.C. (1952) §1002 (c) (1).
216 Pacific Coast Wholesalers' Assn. v. United States, (D.C. Cal. 1949) 81 F. Supp. 991.
217 338 U.S. 689 at 691, 70 S.Ct. 411 (1950).
218 343 U.S. 549, 72 S.Ct. 978 (1952).

transportation over that route.[219] The Court, in an opinion by Chief Justice Vinson, held that the Interstate Commerce Commission had erred in finding that there was a "through route" in existence in the instant case. "We hold that the Commission's efforts to support its finding that a through route from Lenora to Omaha via the Burlington line already exists are inconsistent with the meaning of the term 'through route' as used in the Interstate Commerce Act."[220] What may seem like an arbitrary refusal to follow *Gray v. Powell* is, however, explained by the fact that, as Chief Justice Vinson explained in a companion case, no traffic whatever passed over the route found by the commission to constitute the already-existing "through route."[221] Under these circumstances, the ICC's finding appears patently unreasonable, and hence subject to being set aside, regardless of the doctrine of *Gray v. Powell.*

Other decisions of the highest Court which set aside agency findings of the *Gray v. Powell* type are also explainable, if at all, on the ground that the findings in question were unreasonable. In *Norton v. Warner Co.,*[222] for example, compensation had been awarded under the Longshoremen's and Harbor Worker's Compensation Act[223] to one employed as a boatman on a barge which at the time of the injury was afloat on the navigable waters of the United States, despite the fact that the statute provided that it was not to apply to a "master or member of a crew of any vessel." The finding of the agency that the claimant did not come within the statutory exception was clearly of the kind involved in *Gray v. Powell* and, under that case, subject only to limited review. The Supreme Court held nonetheless that it should be set aside. That Justice Douglas tells us that his decision is based upon the principle that the courts can reverse because of an agency misconstruction of a term of the act[224] is not very helpful, for the same can be said in all the cases involving the *Gray v. Powell* doctrine. And that would, of course, permit the courts to review the rightness of agency constructions. At the same time, it seems to the present

219 Under the Interstate Commerce Act, a carrier must not only provide transportation service at reasonable rates over its own lines but has the additional duty "to establish reasonable through routes with other such carriers, and just and reasonable rates . . . applicable thereto." 54 Stat. L. 900 (1940), 49 U.S.C. (1952) §1 (4).

220 343 U.S. 549 at 560, 72 S.Ct. 978 (1952).

221 United States v. Great Northern Ry. Co., 343 U.S. 562 at 573, 72 S.Ct. 985 (1952).

222 321 U.S. 565, 64 S.Ct. 747 (1944).

223 44 Stat. L. 1424 (1927), 33 U.S.C. (1952) §901.

224 321 U.S. 565 at 569, 64 S.Ct. 747 (1944). See Voris v. Eikel, 346 U.S. 328 at 334, 74 S.Ct. 88 (1953).

writer, that the Court felt that, under the facts of the case, the agency finding was unreasonable. "If a barge . . . can have a 'crew' within the meaning of the Act and if a 'crew' may consist of one man, we do not see why Rusin does not meet the requirements. . . . We know of no reason why a person in sole charge of a vessel on a voyage is not as much a 'member of the crew' as he would be if there were two or more aboard."[225] That being true, said Justice Douglas, "We conclude that only by a distorted definition of the word 'crew' as used in the Act could [the claimant be excluded from the term]."[226]

A more recent case involving the same judicial approach is *Pillsbury v. United Engineering Co.*[227] That case too grew out of a claim for compensation under the Longshoremen's Act. The relevant section of that statute provides, "The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury. . . ."[228] The claims here involved were filed from eighteen to twenty-four months from the dates the employees were injured. The deputy commissioner held that the claims were nevertheless timely, since they had been filed within one year after the claimants had become disabled because of their injuries. The Supreme Court affirmed decisions below vacating the award.[229] A reading of Justice Minton's opinion leaves one with the impression that he felt that the agency finding, which construed the word "injury" in the statute to mean "disability" was not only not right, but also not reasonable. "We are not free," said he, "under the guise of construction, to amend the statute by inserting therein before the word 'injury' the word 'compensable' so as to make 'injury' read as if it were 'disability.' Congress knew the difference between 'disability' and 'injury' and used the words advisedly."[230] For the agency to construe the two terms as interchangeable despite the fact that each was expressly defined differently in the statute[231] was for it to act without a rational basis.

Primary role of lower courts. A Supreme Court decision which appears, at first glance, to be wholly inconsistent with the doctrine of *Gray v. Powell* is *National Labor Relations Board v. American*

225 321 U.S. 565 at 571.
226 Id. at 573.
227 342 U.S. 197, 72 S.Ct. 233 (1952).
228 44 Stat. L. 1432, §13 (a) (1927), 33 U.S.C. (1952) §913 (a).
229 (9th Cir. 1951) 187 F. (2d) 987; (D.C. Cal. 1950) 92 F. Supp. 898.
230 342 U.S. 197 at 199, 72 S.Ct. 233 (1952).
231 44 Stat. L. 1425 (1927), 33 U.S.C. (1952) §902 (2), (10).

Insurance Co.[232] The NLRB there had found that respondent had not bargained in "good faith" with its employees' representative, as was required by the Labor Act, as amended,[233] and ordered respondent so to bargain. The court of appeals, upon review, refused to enforce this portion of the Board's order, since it found that there had been no bad faith on respondent's part.[234] A reading of Chief Judge Hutcheson's opinion reveals no indication of any deference paid to the Board's application of the statutory term "good faith" to the facts of the case, as is required by *Gray v. Powell.* The court seems rather to have substituted its judgment for that of the Board, whose finding was set aside as incorrect.

Despite this apparent violation by the court of appeals of the *Gray v. Powell* doctrine, its refusal to enforce the Board order was affirmed by the Supreme Court. Chief Justice Vinson admitted that the agency finding at issue involved the application of the statutory standard of good faith bargaining to the facts of this case.[235] But, said he, the rule of *National Labor Relations Board v. Pittsburgh S. S. Co.*[236] requires the Court to affirm. In the *Pittsburgh S. S.* case, the Court had indicated that the lower federal courts were henceforth to have the primary role in reviewing administrative action. Were he called to pass upon the administrative findings in the first instance, said Justice Frankfurter, who delivered the *Pittsburgh S. S.* opinion, or to make an independent review of the review by the court of appeals, he might well support the Board's conclusion and reject that of the court below. But Congress has charged the courts of appeals, not the Supreme Court, with the normal and primary responsibility of review. This is not the place to review a conflict of evidence nor to reverse the court of appeals because "were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."[237] Or, to put it another way, henceforth the same degree of finality that is accorded to administrative findings by the courts of appeals will be accorded to the determinations of such courts on review by the Supreme Court.

In its *American Insurance* decision, the Court applied the *Pittsburgh S. S.* rule to the *Gray v. Powell* type of case. "We

232 343 U.S. 395, 72 S.Ct. 824 (1952).
233 61 Stat. L. 142 (1947), 29 U.S.C. (1952) §158 (d).
234 (5th Cir. 1951) 187 F. (2d) 307.
235 343 U.S. 395 at 409, 72 S.Ct. 824 (1952).
236 340 U.S. 498, 71 S.Ct. 453 (1951).
237 Id. at 503.

repeat and reaffirm this rule," stated Chief Justice Vinson, "noting its special applicability to cases where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case."[238]

The *American Insurance* case is consequently not inconsistent with *Gray v. Powell.* Instead, it tells us that the application of the doctrine of that case, like the application of the substantial-evidence rule under the celebrated *Universal Camera* case[239] is now the primary responsibility of the courts before whom review actions are brought initially. Unless their decisions on review are unreasonable, they will not be judicially interfered with from above. This is true even though the highest Court itself would have decided differently, had it been the original reviewing court.

A more recent case explainable on the same basis as *American Insurance* is *Thompson v. Lawson.*[240] It involved a claim for a death benefit by an alleged "widow" under the Longshoremen's and Harbor Workers' Compensation Act. The claim was denied by the deputy commissioner who found that the claimant was not the "widow" of the decedent. The lower courts affirmed[241] and their decisions were upheld by the Supreme Court. In a dissent, Justice Black asserted that the Court's decision was, in effect, contrary to *Gray v. Powell.* He based his view upon the fact that the deputy commissioner had entered his order against the claimant because he felt bound by prior holdings of the Fifth Circuit that an attempted marriage by a wife barred her recovery of compensation as a matter of law.[242] Justice Black would have reversed with directions to remand the cause to the deputy commissioner to determine, free from judicial compulsion, whether, as a fact, petitioner's living apart was for "justifiable cause" or on account of her husband's "desertion." The decision of the Court, said he, nullified the primary right of the agency to apply the relevant statutory term to the facts of the case. "That the Court treats its holding as one of statutory construction cannot obscure the actual effect of what it is doing. The Court is taking from the deputy commissioners their congressionally granted power to determine from all the facts and circumstances whether a widow is entitled to compensation."[243]

238 343 U.S. 395 at 410, 72 S.Ct. 824 (1952).
239 Supra note 48.
240 347 U.S. 334, 74 S.Ct. 555 (1954).
241 (5th Cir. 1953) 205 F. (2d) 527.
242 347 U.S. 334 at 338, 74 S.Ct. 555 (1954).
243 Id. at 339.

Yet, even if Justice Black is correct in his view that the lower courts had refused to give the required deference to the agency findings, it does not follow from this that the Supreme Court must reverse. Under the *American Insurance* case, on the contrary, the decision of the original reviewing court must be affirmed, even if it involves an incorrect application of *Gray v. Powell,* provided that it is not unreasonable. Since, as Justice Black himself admitted,[244] the evidence was such that a finding either way could fairly have been made, the decision of the original reviewing court cannot be characterized as without a rational basis.

Converse of Gray v. Powell. In *Gray v. Powell,* we have emphasized, the agency finding was one upon which its jurisdiction depended. Unless the petitioners in that case were not "producers," the agency was wholly without regulatory power over them. *Phillips Petroleum Co. v. Wisconsin*[245] indicates that the doctrine of *Gray v. Powell* does not apply to the converse type of case, i.e., one where an agency decides that it does not have jurisdiction over a particular individual and its decision is based upon a *Gray v. Powell* type finding.

In the *Phillips Petroleum* case, the Federal Power Commission had found that the Phillips Company was not a "natural-gas" company within the meaning of that term as used in its enabling statute[246] and therefore not within the commission's jurisdiction over rates. It consequently refused to proceed with an investigation it had instituted into the reasonableness of the rates charged by Phillips. In the Supreme Court, it was contended that the FPC's finding had a reasonable basis in law and was supported by substantial evidence and therefore should be upheld under *Gray v. Powell.* That the commission finding was, at the very least, reasonable is shown by the fact that three dissenting justices in the Supreme Court[247] thought that it was right. The majority of the Court nonetheless held that the FPC finding must be set aside as erroneous. The implication is that the *Gray v. Powell* doctrine will not be applied in such a case.[248] Where the administrative finding is one upon which the agency grounds a decision to assert its authority, the courts will defer to its judgment

244 Id. at 338.

245 347 U.S. 672, 74 S.Ct. 794 (1954).

246 52 Stat. L. 821 (1938), 15 U.S.C. (1952) §717.

247 Justices Douglas, Clark, and Burton.

248 The decision of the Supreme Court can also be justified by the rule of the American Insurance case, supra note 232, since it was affirming the decision of the court of appeals. And it should also be noted that the Court was influenced by the fact that the Federal Power Commission had been inconsistent in its interpretations of the statutory term at issue. 347 U.S. 672 at 678.

that regulatory power should be asserted. Where on the other hand, the administrative decision is one which declines jurisdiction, the *Phillips Petroleum* case indicates that the courts may review fully the finding upon which the agency abnegation is based.

Other cases. Two Supreme Court decisions involving the application of the *Gray v. Powell* doctrine cannot be explained on any of the grounds discussed above. The first of them is *Railroad Retirement Board v. Duquesne Warehouse Co.*[249] The Railroad Retirement Act of 1937[250] established a system of annuity, pension, and death benefits for employees of designated classes of employers. The Railroad Retirement Board adjudicates claims of eligible employees for the various types of benefits created by the act. The eligibility of an employee for such benefits is based on service to those included in the act's definition of "employer." The question arose whether the Duquesne Warehouse Co. was such an "employer." The Board after a hearing found that it was. Duquesne brought suit in the district court to compel the Board to set aside its order. That court rendered judgment for Duquesne.[251] The court of appeals affirmed, by a divided vote.[252]

The Supreme Court, in reversing the decisions below, made no mention whatsoever of the doctrine of *Gray v. Powell* or any of the cases following it. Instead, the opinion of Justice Douglas analyzes the statutory provisions and the facts and concludes, without really referring to the agency finding or the deference to be paid to it, that the services performed by Duquesne made it an "employer" under the relevant act. Yet it seems clear, as Professor Davis points out, that this case is exactly like the already-discussed *Hearst* case,[253] where the Court applied the *Gray v. Powell* doctrine to review of a National Labor Relations Board finding that certain newsboys were "employees." "The question whether warehouse services were 'in connection with . . . transportation' seems analytically the same as the question whether newsboys were 'employees.' Both cases involved interpretation of statutory limitations on administrative jurisdiction. Both cases involved application of statutory language to undisputed facts. No reason appears for believing that the agency was more competent, or the Court less competent, to decide whether newsboys were employees than to

249 326 U.S. 446, 66 S.Ct. 238 (1946).

250 50 Stat. L. 307 (1937), 45 U.S.C. (1952) §228a.

251 Duquesne Warehouse Co. v. Railroad Retirement Board, (D.C. N.Y. 1944) 56 F. Supp. 87.

252 (2d Cir. 1945) 148 F. (2d) 473.

253 Supra note 78.

decide whether the warehouse service was in connection with transportation. Yet the scope of the judicial inquiry was apparently different in the two cases."[254] Professor Davis's analysis seems incontrovertible. But the Court in the *Duquesne Warehouse* case did not, as has been shown, appear to follow the doctrine of limited review or even refer to the *Hearst* case or *Gray v. Powell* at all.

What makes the Court's failure to mention the *Gray v. Powell* doctrine even more aggravating is the fact that, in the court of appeals, there had been an intense dispute precisely over that doctrine. The majority opinion by Judge Hutcheson simply refused to apply *Gray v. Powell* and similar cases so as to limit its review of the agency finding at issue. The contention of the Board that those cases required its finding to be upheld if it had only a rational basis was rejected as "heresy."[255] Judge Frank, who dissented, urged the applicability of the *Hearst* case.[256] Despite the sharpness of the disagreement below, the Supreme Court decided as it did, without any reference to *Gray v. Powell, Hearst,* or the dispute in the lower court itself—which, one would think, the Court would have felt called upon expressly to resolve.

A case where the Court followed the same unsatisfactory approach as in its *Duquesne Warehouse* decision is *Board of Governors v. Agnew.*[257] It involved review of an order of the Board of Governors of the Federal Reserve System removing respondents from office as directors of a national bank on the ground that they were employees of a firm "primarily engaged" in underwriting within the meaning of the relevant section of the Banking Act of 1933.[258] Respondents were employees of a firm which received a substantial proportion of its income from underwriting, although its income from that source was never more than 39 percent of its total income. The court of appeals had set aside the Board's order on the ground that, since the firm's underwriting business did not by any quantitative test exceed 50 percent of its total business, it could not properly be found to be "primarily engaged" in the underwriting business.[259]

The Supreme Court reversed, but, as in the *Duquesne Warehouse* case, it did not confine itself to the question of whether the agency finding had a rational basis. Instead, it seems to have

254 DAVIS, ADMINISTRATIVE LAW 889 (1951).

255 148 F. (2d) 473 at 477. It is interesting to note that Jaffe, "Judicial Review: 'Substantial Evidence on the Whole Record,'" 64 HARV. L. REV. 1233 at 1258 (1951), has used the same characterization.

256 148 F. (2d) 473 at 486-487.

257 329 U.S. 441, 67 S.Ct. 411 (1946).

258 48 Stat. L. 162 at 194 (1933), 12 U.S.C. (1952) §78.

259 Agnew v. Board of Governors, (D.C. Cir. 1946) 153 F. (2d) 785.

substituted its judgment for that of the agency on the question whether a company less than half of whose business was underwriting was "primarily engaged in . . . underwriting."[260] According to Justice Douglas, "If the underwriting business of a firm is substantial, the firm is engaged in the underwriting business in a primary way, though by any quantitative test underwriting may not be its chief or principal activity. On the facts in this record we would find it hard to say that underwriting was not one primary activity of the firm."[261] As was true in *Duquesne Warehouse,* the Court's opinion nowhere refers to the doctrine of limited review or the *Gray v. Powell* line of cases.

That the Court in the *Agnew* case was not following the *Gray v. Powell* doctrine of limited review is shown by the concurring opinion of Justice Rutledge. Like the majority of the Court, he agreed that the agency, rather than the lower court, should be upheld. He objected, however, to the implication of full review contained in the majority opinion. "I think it important . . .," said he, "to make clear that my concurrence in the Court's disposition of the case is based upon the ground I have set forth, and not upon independent judicial determination of the question presented on the merits. I do not think this Court or any other should undertake to reconsider, as an independent judgment, the Board's determination upon that question or similar ones likely to arise, if the Board was not without basis in fact for its judgment and does not clearly transgress a statutory mandate."[262]

In both the *Duquesne Warehouse* and *Agnew* cases, it should be noted, the Supreme Court upheld agency findings which had been reversed by courts of appeals. It may well be that the Court felt called upon to demonstrate, not only the reasonableness, but also the rightness of the challenged findings because of this fact.[263] The lower courts had held that an independent warehouse company could not be found to be an "employer" under the Railroad Retirement Act nor could a firm, less than half of whose business was in underwriting, be found to be "primarily engaged" in underwriting. In view of these express court of appeals decisions, the

260 See DAVIS, ADMINISTRATIVE LAW 897 (1951).

261 329 U.S. 441 at 446, 67 S.Ct. 411 (1946).

262 Id. at 451. According to Black, J., dissenting, in Brannan v. Stark, 342 U.S. 451 at 484, 72 S.Ct. 433 (1952), that case also involved an unjustified refusal by the Court to follow the Gray v. Powell doctrine. It seems to the present writer, however, that that doctrine was not relevant in the Stark case, which involved the question of whether the enabling act authorized the Secretary of Agriculture to deduct certain payments to cooperatives from the prices paid to milk producers.

263 It should, however, be pointed out that in Gray v. Powell itself, the Court also upheld an agency finding which had been reversed by the court of appeals. Yet this did not lead the Court to grant other than limited review there.

highest Court may have felt it necessary to show, not only that the agency constructions of the acts were reasonable, but also that it would have construed the statutes similarly had the cases originally come before it. Thus, the Court in the *Agnew* case was showing, to use its own words, that the agency construction of the act "is, we think, not only permissible but also more consonant with the legislative purpose than the construction which the Court of Appeals adopted."[264]

Yet, even if the above explains why the Court acted as it did in *Duquesne Warehouse* and *Agnew,* it is difficult to see why the doctrine of *Gray v. Powell* was referred to in neither case. If the Court was consciously adhering to that doctrine while, at the same time, stating in detail its agreement with the correctness of the administrative findings in order to buttress the agencies, whose views had been rejected below, with the express accord of the nation's highest tribunal,[265] it would certainly seem reasonable to expect the Court to tell us so. And this was particularly true in the *Duquesne Warehouse* case where, as we have seen, there was a sharp division in the court of appeals on the applicability and, indeed, even on the validity of the *Gray v. Powell* doctrine. That the Supreme Court, on the contrary, said nothing about that doctrine or the cases following it may indicate that it was actually doing what it seemed to be doing in *Duquesne Warehouse* and *Agnew*—namely, fully reviewing the challenged agency findings. Yet if that is true, those cases are most disconcerting, because they do not contain any factors, such as those already discussed, which appear to differentiate them from *Gray v. Powell.* In the absence of any explanation by the Court to the contrary, we must conclude that they constitute mere aberrations from the *Gray v. Powell* doctrine. Nor should their practical importance, at least in their specific effects, be overemphasized. Both cases reached the same result as that required under *Gray v. Powell,* i.e., the upholding of the agency findings.

Conclusion

In a recent article, Professor Jaffe has rejected the *Gray v. Powell* doctrine as "heresy." Referring to *Gray v. Powell* and the

264 329 U.S. 441 at 447 (1946).

265 Such an approach may also explain an aspect of the Hearst case, supra note 78, that has troubled commentators, namely, the lengthy dissertation by the Court there in the first portion of its opinion to demonstrate its concurrence with the agency view that its finding on the question whether newsboys were "employees" under the relevant statute need not necessarily be governed by the common-law test to determine the existence of an employment relationship. Since the court of appeals had held in that case that the common-law test was controlling, the Court may have felt it desirable to state expressly

Hearst[266] and *Dobson*[267] cases, he states, "There are expressions in these cases which suggest that Congress, merely by the use of a 'broad statutory term' to be applied from case to case, has thereby delegated to the agency the power to determine what considerations are relevant in applying it. In this connection it is of course admitted that if the concept of relevancy which is chosen is unreasonable the courts may censor it. But it is said that if the judgment is reasonable the courts are powerless to interfere, though independently they would have arrived at a different conclusion. This, in my opinion, is heresy."[268]

It is perhaps unnecessary to state that the present writer shares Professor Jaffe's view. The doctrine of *Gray v. Powell* is inconsistent with the very basis of the law of judicial review in the Anglo-American world. From almost the beginning of our administrative law, review has focussed upon two main questions: that of jurisdiction and that of proper application of the law. The courts have left questions of fact for the administrator, subject only to limited review. Ensuring that agencies remain within the limits of their delegated powers and that they have not misconstrued the law has, on the contrary, been conceived of as a judicial function. Yet, under *Gray v. Powell,* both statutory construction and the determination of agency jurisdiction are taken from the reviewing court and vested primarily in the administrator.

Nor are the essential effects of the *Gray v. Powell* doctrine altered by the characterization of a disputed agency finding as only one of "fact"[269] or as involving merely the application, and not the interpretation, of a statute. Much as courts and commentators may seek to obscure it, nothing they say can change the fact that a finding like that at issue in *Gray v. Powell* has both legal and factual elements. And, as a leading supporter of the doctrine of limited review concedes, it does involve a question of statutory interpretation. "Analytically, the question [in *Gray v. Powell*] whether Seaboard was a 'producer' was at least in part a question not only of law but also of statutory interpretation—a question of the meaning of the term 'producer.'"[270]

that the agency was not only reasonable, but also right, in holding that the statute did not import the common-law test.

266 Supra note 78.

267 Supra note 82.

268 Jaffe, "Judicial Review: 'Substantial Evidence on the Whole Record'," 64 HARV. L. REV. 1233 at 1258 (1951).

269 As was done by the Court in O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 71 S.Ct. 470 (1951).

270 DAVIS, ADMINISTRATIVE LAW 883 (1951).

The proper approach to the *Gray v. Powell* type of finding is that of the late Master of the Rolls in *In re Butler,*[271] an important English case. At issue in it was an administrative finding that certain buildings were "houses" rather than "other buildings," under the relevant section of the Housing Act, 1936.[272] "It seems to me," said Lord Greene in the course of his opinion, "that these buildings properly fall under the word 'houses' in the section. Whether a particular building does or does not fall under that word is a mixed question of law and fact; fact in so far as it is necessary to ascertain all the relevant facts relating to the building, and law in so far as the application of the word 'houses' to those facts involves the construction of the Act."[273]

Under Lord Greene's view, the reviewing court may use its own independent judgment with regard to the application of the statutory term to the particular factual situation. Due weight is to be given to the administrative ascertainment of the facts, but it is for the court to determine whether those facts come within the statutory concept. This was the approach taken by the Master of the Rolls in the *Butler* case, where he decided whether or not the buildings in question were "houses" on the basis of the facts as found by the administrative body. "As so frequently happens in dealing with Acts of Parliament, words are found used—and very often the commoner the word is, the greater doubt it may raise—the application of which to individual cases can only be settled by the application of a sense of language in the context of the Act, and if I may say so, a certain amount of common sense in using and understanding the English language in a particular context. There may, of course, be cases which fall very near a borderline, and it is impossible to lay down any exhaustive definition as to what is or is not a house. Every case must be considered in the light of its own facts, but in the present case I am of opinion that these buildings come under the word 'houses.' "[274] To the present writer, at least, the approach of Lord Greene seems far preferable to that followed by our Supreme Court in the *Gray v. Powell* line of cases.

While the judicial refusal in this country to concede that statutory interpretation is involved in the *Gray v. Powell* type of case cannot obscure the fact that such interpretation is involved, it must be conceded that it has enabled the highest Court to all but

271 [1939] 1 K.B. 570.
272 26 Geo. V and 1 Edw. VIII, c. 51, §25.
273 [1939] 1 K.B. 570 at 579.
274 Ibid.

nullify language in the Administrative Procedure Act of 1946[275] which can be said to eliminate the *Gray v. Powell* doctrine. Under that statute, "the reviewing court shall decide all relevant questions of law, interpret . . . statutory provisions."[276] Since, as has already been shown, the *Gray v. Powell* type of finding does contain legal elements and involves statutory interpretation, it can be claimed that this provision of the procedure act eliminates the doctrine of narrow review in the *Gray v. Powell* situation.[277] The Supreme Court has, however, avoided this result by its refusal to concede that an agency finding of the kind under discussion involves statutory interpretation. In *O'Leary v. Brown-Pacific-Maxon, Inc.*,[278] on the contrary, the Court held that a finding that a death arose "out of and in the course of employment" was one of "fact," whose review was governed by the substantial-evidence rule. By its use of its power to classify challenged agency findings, the Court has been able to maintain the *Gray v. Powell* doctrine unaltered, despite the seemingly contrary language of the Administrative Procedure Act.[279]

It must, of course, be emphasized that the question of the desirability of the *Gray v. Powell* doctrine and that of its application are two entirely different things. Even if, like the present writer, one doubts the soundness of the doctrine and hopes for its ultimate repudiation, he can still desire, so long as it is not overruled, to see it applied in a logically consistent fashion. To one concerned with the law, not necessarily as pure logic, but at least as a rational science, there is nothing more disconcerting than a doctrine which is sometimes followed and sometimes not, with the choice in particular cases dependent more or less upon judicial caprice.

That is why the embarrassingly large number of Supreme Court decisions that do not adhere to the doctrine of *Gray v. Powell* is of

275 60 Stat. L. 237 (1946), 5 U.S.C. (1952) §1001.

276 Section 10 (e).

277 See, e.g., DICKINSON, THE JUDICIAL REVIEW PROVISIONS OF THE FEDERAL ADMINISTRATIVE PROCEDURE ACT (SECTION 10): BACKGROUND AND EFFECT, IN THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 546, 585, Warren ed. (1947).

278 340 U.S. 504, 71 S.Ct. 470 (1951).

279 The ineffectiveness of the Administrative Procedure Act in doing away with the Gray v. Powell doctrine has led the Hoover Commission task force on administrative law to recommend in its recent report that that act be amended to allow the reviewing court to "determine all relevant questions of law and interpret any constitutional and statutory provisions involved, and it shall apply such determination to the facts duly found or established, whether or not such court is the trier of the facts." COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 218, 374 (1955). The Brown-Pacific-Maxon case would seem to indicate that some such amendment will be necessary before the Procedure Act will have any real effect upon the doctrine of Gray v. Powell.

such concern to the student of administrative law. Unless they can be explained upon a rational basis, the law of his subject is, to say the least, in a most unsatisfactory state.

In the analysis which has been given in this article of the decisions which do not appear to follow the *Gray v. Powell* doctrine, it has, it is believed, been shown that the vast majority of those decisions are not really inconsistent with *Gray v. Powell.* And that is true because, in all but two of the decisions analyzed,[280] there were present factors which might logically induce the reviewing court to decline to defer to the challenged agency finding. All of these factors were logically inherent in *Gray v. Powell* itself as that case was decided by the highest Court and the presence of any of them in a case should make for the non-application of the doctrine of limited review.

The cases which have been discussed indicate that the doctrine of *Gray v. Powell* will not be followed:

1. Where the challenged agency finding has not been made in a specific contested case after a full, formal adversary hearing.[281]

2. Where the challenged finding is inconsistent with other administrative interpretations, whether made by the same or by other agencies.[282]

3. Where the finding at issue is one upon which the agency bases a decision that it does not have jurisdiction in the particular case.[283]

In addition, it should of course be realized that, even under the doctrine of limited review, the courts can inquire into the reasonableness of challenged findings. *Gray v. Powell* type findings will consequently be set aside, upon review,

4. Where the court finds that they are without a rational basis.[284]

The *American Insurance* decision[285] adds a further factor which is needed to explain some of the recent Supreme Court cases, which otherwise might seem inconsistent with *Gray v. Powell.* The highest Court will not reverse decisions below setting aside agency findings

280 Railroad Retirement Board v. Duquesne Warehouse Co., supra note 249, and Board of Governors v. Agnew, supra note 257.

281 Pp. 39-45 supra.

282 Pp. 45-55 supra.

283 Pp. 61-62 supra.

284 Pp. 56-58 supra.

285 Note 232 supra.

5. Where the action of the original reviewing court is reasonable, even though the Supreme Court itself, had the review action come before it initially, would have upheld the agency finding under the doctrine of *Gray v. Powell.*[286]

The presence in them of one or more of the above-listed factors explains the non-application of the doctrine of limited review in practically all the cases which have been discussed. The use of these factors to explain the judicial failure to follow *Gray v. Powell* transforms the doctrine of that case from one whose application depends on the vagaries of the highest Court to one which is applied in a more or less logical and consistent manner. And, if that is the case, it is a doctrine which, whatever the doubts that one may have as to its ultimate desirability, is a workable one whose application or non-application can be predicted upon logical principles.

It is true that the criteria which have been emphasized in this paper as those upon which the use of the *Gray v. Powell* doctrine turns are not those which other writers on the subject have urged. But it is also true that other writers have been able to explain only a small proportion of the Supreme Court decisions which appear inconsistent with *Gray v. Powell,* relegating the unexplained cases to the limbo of uncontrolled judicial discretion. More disconcerting perhaps is the fact that the Supreme Court itself has not articulated the tests urged by the present writer as the factors which have induced it not to follow the doctrine of limited review. The failure of the Court itself to give any real explanation of its seemingly arbitrary refusals to adhere to *Gray v. Powell* does, it must be conceded, make matters most difficult for those who seek to analyze the jurisprudence of the highest tribunal. The Court's dereliction does not, however, preclude attempts at such analysis by outside observers. Nor are their analyses—otherwise workable—rendered invalid because they do not coincide with what, if anything, the Court has said on the subject. On the contrary, so far as the subject under discussion in this article is concerned, it is almost essential for the commentator to rely more upon his own analysis than upon what little the Court has said. For, if one had to rely only upon the Court's statements with regard to the application of the doctrine of *Gray v. Powell,* he would most certainly have to declare, with Mark Twain and Justice Jackson, "The more you explain it, the more I don't understand it."

286 Pp. 58-61 supra.